Supreme Court, U.S.
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No. 01-312 AUG 16 2001

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In The

Supreme Court of the United States

SHARIN C. BROWN,

Petitioner,

v.

FORD MOTOR COMPANY, a Delaware corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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25 pp

QUESTION PRESENTED

Was it error for the United States Court of Appeals for the Fourth Circuit to interpret § 46.2-1094(D) of the Code of Virginia to allow the introduction of seat belt nonuse evidence, when the aforesaid statute (which clearly bans the admission of all such evidence) sets forth the substantive policy of Virginia as to such evidence?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Authorities iii

Opinions Below 1

Basis for Jurisdiction 1

Constitutional and Statutory Provisions 1

Statement of the Case 3

Reasons for Granting the Writ 8

The Decision Below Plainly Misapplies the Rules of Statutory Construction 8

A. It Was Unreasonable for the Fourth Circuit To Hold that "a Violation of this Section" Plainly Refers Only to a Citation for a Violation of the Section 10

B. The Rules Governing Statutory Construction Do Not Support the Fourth Circuit's Opinion 11

C. The Evidence Introduced at Trial Satisfied All the Elements for a Violation of § 46.2-1094 14

Conclusion 15

TABLE OF AUTHORITIES

Page(s)

Cases:

Brown v. Ford Motor Co.,
No. 99-2513, 2001 WL 285072
(4th Cir. Mar. 23, 2001) ..... *passim*

Brown v. Ford Motor Co.,
67 F. Supp. 2d 581 (E.D. Va. 1999) 1

City of Va. Beach v. ESG Enters., Inc.,
413 S.E.2d 642 (Va. 1992) 12

First Va. Bank v. O'Leary,
467 S.E.2d 775 (Va. 1996) 12

Hottle v. Beech Aircraft Corp.,
47 F.3d 106 (4th Cir. 1995) 7

Lucy v. County of Albemarle,
516 S.E.2d 480 (Va. 1999) 11, 13

Markham v. City of Newport News,
292 F.2d 711 (4th Cir. 1961) 8

Melanson v. Commonwealth,
539 S.E.2d 433 (Va. 2001) 10, 13

Patterson v. Shumate,
504 U.S. 753 (1992) 10

Temple v. City of Petersburg,
29 S.E.2d 357 (Va. 1944) 9

STATUTES

28 U.S.C. § 1254 1

28 U.S.C. § 2101 1

Va. Code Ann. § 46.2-1092 ..... *passim*

Va. Code Ann. § 46.2-1094 ..... *passim*

S. Ct. R. 13 1

Rules

Fed. R. Civ. P. 72 4

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (hereinafter "the Fourth Circuit") in *Brown v. Ford Motor Co.* is unreported, can be found at 2001 WL 285072 (4th Cir. Mar. 23, 2001), and is set forth in the Appendix hereto. (*See* App. at 1.)

The opinion of the United States District Court for the Eastern District of Virginia (hereinafter "the District Court") in *Brown v. Ford Motor Co.* is reported at 67 F. Supp. 2d 581 (E.D. Va. 1999), and is set forth in the Appendix hereto. (*See* App. at 19.)

BASIS FOR JURISDICTION

The Fourth Circuit rendered the decision at issue here on March 23, 2001. The Fourth Circuit's order denying Petitioner's petition for rehearing and petition for rehearing en banc was filed on May 18, 2001. This petition for writ of certiorari has been filed within ninety (90) days from the date of that denial. *See* 28 U.S.C. § 2101(c); S. Ct. R. 13.3.

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 46.2-1092 of the Virginia Code:

> Failure to use the safety lap belts or a combination of lap belts and shoulder harnesses after installation shall not be deemed to be negligence. Nor shall evidence of such nonuse of such devices be considered in mitigation of damages of whatever nature.

Section 46.2-1094 of the Virginia Code:

> A. Each person at least sixteen years of age and occupying the front seat of a motor vehicle equipped . . . with a safety belt system . . . shall wear the appropriate safety belt system at all times while the motor vehicle is in motion on any public highway. . . .
>
> . . .
>
> D. A violation of this section shall not constitute negligence, be considered in mitigation of damages of whatever nature, be admissible in evidence or be the subject of comment by counsel in any action for the recovery of damages arising out of the operation, ownership, or maintenance of a motor vehicle, nor shall anything in this section change any existing law, rule, or procedure pertaining to any such civil action.
>
> . . .
>
> F. No citation for a violation of this section shall be issued unless the officer issuing such citation has cause to stop or arrest the driver of such motor vehicle for the violation of some other provision of this Code or local ordinance relating to the operation, ownership, or maintenance of a motor vehicle or any criminal statute.

STATEMENT OF THE CASE

On August 12, 1996, Petitioner Sharin C. Brown was operating a 1991 Ranger pickup truck ("the Ranger") that Respondent Ford Motor Company ("Ford") designed, manufactured, and marketed. Ms. Brown was driving the Ranger in Suffolk, Virginia, on a stretch of road that was unfamiliar to her. (App. at 41-44.) She unexpectedly encountered gravel lying on the road at a point where it curved. (*See* App. at 45.) The Ranger began sliding as it crossed the gravel and ultimately rolled over several times. (*See* App. at 45.) Ms. Brown was ejected from the Ranger and suffered severe injuries. (*See* App. at 44-48.)

Ms. Brown is a citizen of North Carolina. Ford is incorporated in Delaware and has its principal place of business in Michigan. Accordingly, Ms. Brown invoked the District Court's diversity of citizenship jurisdiction when she filed her action against Ford on August 5, 1998, in the Norfolk Division of the District Court. In her complaint, she asserted separate claims of negligence; breach of express and implied warranties; fraudulent misrepresentations as to vehicle stability; willful, wanton, and reckless misconduct as to vehicle instability; and violation of the Virginia Consumer Protection Act.

On April 20, 1999, Ms. Brown filed a motion in limine that sought the exclusion of all evidence regarding the usage or nonusage of seat belts during the accident at issue. She based her motion on the express language of § 46.2-1094(D) of the Virginia Code.

Magistrate Judge Tommy E. Miller conducted a hearing on Ms. Brown's motion in limine on May 11, 1999, and granted that part of the motion regarding seat belt usage/nonusage by Christopher Brown (Ms. Brown's son), who was a passenger in the Ranger at the time of the accident, but denied the motion as to Ms. Brown's usage/nonusage of her own seat belt. Magistrate Judge Miller entered an order memorializing his ruling on May 13, 1999.

On May 20, 1999, pursuant to Rule 72(a) of the Federal Rules of Civil Procedure, Ms. Brown filed a written objection to Magistrate Judge Miller's ruling on her motion in limine. Ford filed an objection to the ruling on May 21, 1999. The objections were unresolved at the time the trial commenced on May 24, 1999, with the Honorable Henry C. Morgan, Jr., presiding.

During his opening statement, Ford's counsel stated that "if you believe . . . Mrs. Brown's negligence was the *sole proximate cause* of this accident, and I think the evidence will show that, then, of course, under all those circumstances you would find your verdict for Ford." (App. at 34 [emphasis added] .)

Following the parties' opening statements, the District Court addressed the issue of seat belt nonuse evidence for the first time; the Court decided (i) to overrule Ms. Brown's objection to Magistrate Judge Miller's denial (in part) of Ms. Brown's motion in limine and (ii) to sustain Ford's objection to Magistrate Judge Miller's grant (in part) of the motion in limine. (*See* App. at 35-36.) The District Court noted Virginia's statutory prohibition against the introduction of seat belt nonuse evidence to show negligence, and expressly stated that that aspect of Virginia law is substantive. (App. at 37.) The District Court then stated that the "language about mitigation . . . seems to be about somewhere in the middle." (App. at 35-36.) The District Court concluded that the remainder of Virginia law on seat belt nonuse evidence is not substantive. (*See* App. at 35-36.) The overall result of the District Court's review of the Magistrate Judge's ruling was the denial in full of Ms. Brown's motion in limine.

During Ms. Brown's case-in-chief, her husband, David, testified on direct examination that the Ranger was equipped with seat belts, and that Ms. Brown "buckled up religiously." (Tr. at 40.) Ford's cross-examination of Ms.

Brown elicited testimony that it was her habit to wear her seat belt, but that she had no specific recollection of wearing her seat belt on the day of the accident. (App. at 49-50.)

On direct examination as Ford's witness, the investigating police officer testified that based on his examination of the Ranger he did not believe Ms. Brown was belted at the time of the accident. (*See* App. at 54-55.) One of Ford's expert witnesses, a biomechanical engineer, testified that in his opinion Ms. Brown was not using her seat belt at the time of the accident. (App. at 62-63.)

Ford introduced evidence of Christopher Brown's seat belt usage via the testimony of the investigating officer. (*See* App. at 54-56.) Thereafter, Ford repeatedly elicited testimony from its witnesses which emphasized that Christopher Brown was belted at the time of the accident. (*See, e.g.*, App. at 57 [investigating officer], 59, 60-61, & 62-63 [expert witness].)

Ford elicited testimony from Ms. Brown that compared the major injuries she suffered to the relatively minor injuries Christopher Brown experienced (i.e., 30 stitches in one arm and a concussion). (*See* App. at 49, 51-52.) Ford also sought to link the severity of Ms. Brown's injuries to her alleged nonuse of her seat belt. (*See* App. at 63-75.)

During the trial, the District Court stated that it was "wrestling with . . . whether [seat belt nonuse evidence] could be considered on the issue of proximate cause." (App. at 58; *see also* App. at 37-38.) The District Court ultimately placed no restrictions whatsoever on the jury's consideration of seat belt nonuse evidence with regard to the issue of causation. (*See* App. at 76-88.)

The District Court instructed the jury that its first task was to determine (i) whether Ford was negligent in designing the Ranger and, if so, (ii) whether that negligence was a proximate cause of Ms. Brown's injuries. (App. at 83.) The District Court expressly instructed the jury that it could consider the evidence of Ms. Brown's seat belt nonuse "in

determining whether the defendant negligently designed the motor vehicle." (App. at 85.) From the standpoint of liability (as opposed to damages), the District Court limited the jury's consideration of seat belt nonuse evidence only with regard to contributory negligence. (*See* App. at 85.)

In closing argument, Ford's counsel contrasted Christopher Brown's minor injuries with the severe injuries Ms. Brown suffered; stated that "[i]f Mrs. Brown had been belted in her seat she would not have been . . . ejected and injured"; and asserted that "a person belted in their seat would not be injured, and Chris is the best evidence of that." (App. at 89-90.)

Ford's counsel also discussed in detail the investigating officer's testimony regarding his conclusion that Ms. Brown was not belted at the time of the accident. (*See* App. at 90-91.) Ford's counsel added that the investigating officer

> had determined that Mrs. Brown had been ejected and thrown at least twenty feet, and they didn't call him, even to tell you where the marks he found were or to tell you about the accident. You're entitled to consider that.

(App. at 92.)

Ford's counsel commented as follows regarding Ms. Brown's decision not to call her son as a witness:

> They didn't call Chris Brown, the plaintiff's son. And of anybody in the world that could say that Mrs. Brown was belted, I guess he could say it. Anybody who could say his mother wasn't speeding, he could say it. Now, what he would say we don't know.

(App. at 92-93.)

Finally, Ford's counsel gave his view of the District Court's instructions on contributory negligence, to include the comment that any negligence on Ms. Brown's part would mean the failure of her case. (*See* App. at 97-98.) In his succeeding comments, Ford's counsel repeatedly mentioned the fact that the Ranger was equipped with seat belts and the evidence that Ms. Brown was not belted at the time of the accident. (*See* App. at 98-102.)

The jury returned a verdict for Ford on June 2, 1999. Ms. Brown filed a timely motion for a new trial, which the District Court denied via a memorandum opinion and final order entered on October 13, 1999.

Ms. Brown's motion for a new trial was founded on the proposition that § 46.2-1094(D) of the Virginia Code is, in its entirety, substantive state law that expressly prohibits the introduction of any evidence of seat belt nonuse. *See Hottle v. Beech Aircraft Corp.*, 47 F.3d 106, 110 (4th Cir. 1995) ("'[T]here are circumstances in which a question of admissibility of evidence is so intertwined with a state substantive rule that the state rule . . . will be followed in order to give full effect to the state's substantive policy.'") (citation omitted). In its decision denying Ms. Brown's motion, the District Court found that the first two elements of § 46.2-1094(D) (i.e., those dealing with negligence and mitigation of damages) are substantive in nature. (App. at 25.) The District Court then held that "[t]he last element of § 46.2-1094(D) . . . is procedural in that it deals with admissibility of evidence and comment of counsel." (App. at 25.) In explaining this division of the statute into both substantive and procedural parts, the District Court stated that the statute was in derogation of the common law and was thus subject to strict construction. (App. at 26.)

On appeal, Ms. Brown repeated her argument that § 46.2-1094(D) is substantive state law that was binding on a federal court exercising its diversity of citizenship jurisdiction. The Fourth Circuit affirmed the District Court's admission of seat belt nonuse evidence, but the Fourth

Circuit did not address the substantive/procedural issue. Instead, relying on the doctrine of *in pari materia*, the Fourth Circuit held that the phrase "[a] violation of this section" in § 46.2-1094(D) means only "an official determination that [§ 46.2-1094] has been violated, such as a law enforcement officer's citation for seat belt nonuse (or at least his conclusion to that effect) or a formal administrative or judicial finding of nonuse." (App. at 6.)

As an apparent alternative holding, the Fourth Circuit found that § 46.2-1094(D) "at most forbid[s] admission of or comment upon evidence that would be sufficient to establish all of the elements of a violation of the section," (*see* App. at 7), and that insufficient evidence of such elements was introduced at the trial of this action, (*see* App. at 7).

The Fourth Circuit denied Ms. Brown's petition for rehearing and petition for rehearing en banc on May 18, 2001. Ms. Brown has filed this petition for writ of certiorari within ninety days of the Fourth Circuit's refusal to reconsider its decision.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW PLAINLY MISAPPLIES THE RULES OF STATUTORY CONSTRUCTION.

A federal court exercising its diversity of citizenship jurisdiction is not at liberty to disregard the clear mandate of a state's substantive policy. *See Markham v. City of Newport News*, 292 F.2d 711, 718 (4th Cir. 1961) ("[A] federal court exercising its diversity jurisdiction to adjudicate rights created by the state sits as another court of that state and should reach the same result as the state courts would reach in deciding the identical issue."); *Temple v. City of Petersburg*, 29 S.E.2d 357, 358 (Va. 1944) ("If the language of a statute is plain and unambiguous, and its meaning perfectly clear and

definite, effect must be given to it regardless of what courts think of its wisdom or policy."). The Fourth Circuit's opinion in this case is not faithful to Virginia's substantive policy.

Section 46.2-1094(A) of the Virginia Code mandates that each front seat occupant of a motor vehicle use a seat belt, and § 46.2-1094(C) makes it a misdemeanor to violate § 46.2-1094(A). However, § 46.2-1094(D) states as follows regarding the effect in a civil proceeding of a violation of the statute:

> A violation of this section shall not constitute negligence, be considered in mitigation of damages of whatever nature, be admissible in evidence or be the subject of comment by counsel in any action for the recovery of damages arising out of the operation, ownership, or maintenance of a motor vehicle, nor shall anything in this section change any existing law, rule, or procedure pertaining to any such civil action.

The Fourth Circuit held that the phrase "[a] violation of this section" means only "an official determination that [§ 46.2-1094] has been violated, such as a law enforcement officer's citation for seat belt nonuse (or at least his conclusion to that effect) or a formal administrative or judicial finding of nonuse." (App. at 6.) The Fourth Circuit asserted that this reading of the statute "was most consonant with the plain language enacted by the state legislature." (App. at 7.) The Fourth Circuit also used the *in pari materia* doctrine to justify its holding. However, neither reason nor the applicable rules of statutory construction support the Fourth Circuit's strained construction of the statute.

A. It Was Unreasonable for the Fourth Circuit to Hold that "a Violation of this Section" Plainly Refers Only to a Citation for a Violation of the Section.

The Fourth Circuit asserted that the "plain language" rationale for its holding was valid "[b]ecause section 46.2-1094 does not categorically prohibit seat belt nonuse by all persons under all circumstances." (App. at 7.) However, as the discussion below shows, the statute itself distinguishes between "a violation of this section" and "a citation for a violation of this section." Moreover, if a person innocent of this whole controversy were to ask, "What *conduct* does the phrase 'a violation of this section' refer to?," the only reasonable answer would be "a failure to wear a seat belt while a front-seat occupant of a passenger vehicle." *See Melanson v. Commonwealth*, 539 S.E.2d 433, 435 (Va. 2001) ("'The plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction.'") (citation omitted). Therefore, the Fourth Circuit's assertion that the plain language of the statute supports the Fourth Circuit's holding is in fact judicial hair-splitting at its worst. *See Patterson v. Shumate*, 504 U.S. 753, 766 (Scalia, J., concurring) (1992).[1]

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[1] In *Patterson*, Justice Scalia stated as follows:

> When the phrase "applicable nonbankruptcy law" is considered in isolation, the phenomenon that three Courts of Appeals could have thought it a synonym for "state law" is mystifying. When the phrase is considered together with the rest of the Bankruptcy Code (in which Congress chose to refer to state law as, logically enough, "state law"), the phenomenon calls into question whether our legal culture has so far departed from attention to text, or is so lacking in agreed-upon methodology for creating and interpreting text, that it any longer makes sense to talk of "a government of laws, not of men."

Id., 504 U.S. at 766 (Scalia, J., concurring).

B. The Rules Governing Statutory Construction Do Not Support the Fourth Circuit's Opinion.

As the dissent to the Fourth Circuit's decision pointed out, § 46.2-1094 itself expressly views "[a] violation of this section" as a separate thing from a citation for a violation of the section. (*See* App. at 6 ["Va. Code Ann. § 46.2-1094(D)'s reference to a 'violation of this section' contrasts with § 46.2-1094(F)'s explicit reference to the issuance of a 'citation for a violation of this section.'"] [Williams, J., dissenting].) The Fourth Circuit majority dismissed this fact by implicitly asserting its reliance on the *in pari materia* doctrine:

> [U]nlike Va. Code § 46.2-1092, which is virtually identical in all relevant respects to Va. Code § 46.2-1094(D), Va. Code § 46.2-1094(F) is not substantively, textually, or structurally like Va. Code § 46.2-1094(D), and consequently is a comparatively poor provision from which to infer the legislature's intent as to section 46.2-1094(D).

(App. at 9.) The problem with this almost summary dismissal of contrary language within the very statute at issue is that the dismissal ignores other, more pertinent rules of statutory construction which strongly counsel against the majority's conclusion.

"In the construction of statutes, the courts have but one object, to which all rules of construction are subservient, and that is to ascertain the will of the legislature . . . ." *Lucy v. County of Albemarle*, 516 S.E.2d 480, 485 (Va. 1999). The doctrine of *in pari materia* "is only one rule of statutory construction among many." *Id.* Two rules of greater importance to this case are a court's duty (i) to "assume that 'the legislature chose, with care, the words it used when it

enacted the relevant statute,'" *City of Va. Beach v. ESG Enters., Inc.*, 413 S.E.2d 642, 644 (Va. 1992) (citation omitted), and (ii) to construe a statute "'from its four corners and not by singling out a particular word or phrase,'" *First Va. Bank v. O'Leary*, 467 S.E.2d 775, 777 (Va. 1996) (citation omitted). The result the Fourth Circuit reached on Ms. Brown's appeal ignores both of these rules.[2]

First, as the foregoing discussion shows, the Fourth Circuit's opinion turned on the proposition that "[a] violation of this section" and "a citation for a violation of this section" are one and the same thing. However, as noted above, the Virginia General Assembly expressly distinguished between these two separate events within § 46.2-1094 itself. *Compare* § 46.2-1094(D) ("[a] violation of this section") *with* § 46.2-1094(F) ("a citation for a violation of this section"). As noted above, a court has a duty to assume that the legislature acted with care in making these different word choices, but the Fourth Circuit's opinion expressly refuses to accord any significance to this vitally different language.

Second, the Fourth Circuit's statement, as set forth above, that § 46.2-1094(F) "is a comparatively poor provision from which to infer the legislature's intent as to section 46.2-1094(D)," (App. at 9), implicitly established a hierarchy of the rules of statutory construction where no such hierarchy exists, and placed the *in pari materia* doctrine above the "four corners" doctrine. This action was error, for the "four corners" doctrine is a "cardinal rule of statutory construction," *First Va. Bank*, 467 S.E.2d at 777, and a court is not at liberty to disregard that doctrine simply because one provision within the four corners of a statute is not

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[2] As explained above, these rules of construction are binding here given the fact that the District Court tried this action under that court's diversity of citizenship jurisdiction.

"substantively, textually, or structurally" like another provision that also appears within those four corners, *cf. Melanson*, 539 S.E.2d at 435 ("'A statute is not to be construed by singling out a particular phrase; every part is presumed to have some effect *and is not to be disregarded unless absolutely necessary.*'") (emphasis added; citation omitted).

The Fourth Circuit acknowledged that it is not unreasonable to construe § 46.2-1094(D) as excluding evidence of seat belt nonuse versus merely a citation or other "official" determination showing a violation of § 46.2-1094. (*See* App. at 6.) Considering this concession in light of (i) the assumption that the Virginia General Assembly chose with care the language of § 46.2-1094(D) and (F) and (ii) the fact (based on the "four corners" doctrine) that the General Assembly knew, when it drafted § 46.2-1094, how to distinguish between "[a] violation of this section" and "a citation for a violation of this section," it is apparent that Ms. Brown's (and the dissenting Fourth Circuit judge's) interpretation of § 46.2-1094(D) better captures the intent of the General Assembly and should thus be followed. *See Melanson*, 539 S.E.2d at 435 ("'The plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction.'") (citation omitted).

Finally, it is important to note that "the reason for considering statutes *in pari materia* is that this permits 'any apparent inconsistencies *[to] be ironed out* whenever that is possible.'" *Lucy*, 516 S.E.2d at 485 (emphasis added; citation omitted). It is thus ironic that the Fourth Circuit's opinion (which relies heavily on the *in pari materia* doctrine) *creates* a conflict between § 46.2-1092 and § 46.2-1094(D), as the opinion attributes a far greater exclusionary reach to the former statute than to the latter.

Given that the very point of the *in pari materia* doctrine is to resolve inconsistencies, it is reasonable to conclude that the doctrine demands a result exactly

opposite to the one the Fourth Circuit reached. That is, the *in pari materia* doctrine and the aforementioned rules of statutory construction in conjunction show that the language of § 46.2-1092 does not act to *limit* the reach of § 46.2-1094(D); instead, the scope of § 46.2-1092, coupled with the inferences that flow from § 46.2-1094's express distinction between "[a] violation of this section" and "a citation for a violation of this section," show that in § 46.2-1094(D) the Virginia General Assembly sought to prohibit the introduction of *evidence* of seat belt nonuse, not merely the introduction of some official determination of a violation of § 46.2-1094.

C. The Evidence Introduced at Trial Satisfied All the Elements for a Violation of § 46.2-1094.

An apparent alternative holding in the Fourth Circuit's opinion was that § 46.2-1094(D) "at most forbid[s] admission of or comment upon evidence that would be sufficient to establish all of the elements of a violation of the section," (*see* App. at 7), and that insufficient evidence of such elements was introduced at the trial of this action, (*see* App. at 9 n.2). Ms. Brown respectfully urges that this holding is in error for the reasons set forth by the dissent to the Fourth Circuit's opinion. (*See* App. at 10 [Williams, J., dissenting].)[3]

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[3] Regarding this issue, it is particularly noteworthy that, on direct examination as a witness for Ford, the investigating police officer testified that his examination of the Ranger pickup led him to conclude that Ms. Brown was not using her seat belt at the time of the accident. (*See* App. at 137-38.)

CONCLUSION

Ms. Brown respectfully contends that, for all of the reasons identified herein, this Court should issue a writ of certiorari to review the decision of the Fourth Circuit and, ultimately, reverse that decision and remand Ms. Brown's action to the District Court for a new trial.

Respectfully submitted,

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TABLE OF CONTENTS
Appendix to Petition

Page

Opinion,
United States Court of Appeals
for the Fourth Circuit
entered March 23, 2001 ..... App. 1

Order of the
Honorable Henry Coke Morgan, Jr.
United States District Court
for the Eastern District of Virginia at Norfolk
entered October 12, 1999 ..... App. 19

Order
United States Court of Appeals
for the Fourth Circuit
Denying Rehearing and Rehearing *En Banc*
entered May 18, 2001 ..... App. 33

Excerpts of Joint Appendix
filed March 7, 2000:

Excerpts of Transcript of
Jury Trial before
The Honorable Henry Coke Morgan, Jr.
on May 24-28, 1999 ..... App. 34

Excerpts of Transcript of
Jury Trial before
The Honorable Henry Coke Morgan, Jr.
on June 1-2, 1999 ..... App. 76

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SHARIN C. BROWN,

Plaintiff-Appellant,

v. **No. 99-2513**

FORD MOTOR COMPANY,
a Delaware corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk.
Henry C. Morgan Jr., District Judge.
(CA-98-880-2)

Argued: September 29, 2000
Decided: March 23, 2001
Entered: March 23, 2001

Before LUTTIG and WILLIAMS, Circuit Judges, and Frederick P. STAMP, Jr., Chief United States District Judge for the Northern District of West Virginia, sitting by designation.

Affirmed by unpublished opinion. Judge Luttig wrote the majority opinion, in which Chief Judge Stamp joined. Judge Williams wrote a dissenting opinion.

COUNSEL

ARGUED: Martin Joseph McGetrick, CHANDLER, FRANKLIN & O'BRYAN, Charlottesville, Virginia, for Appellant. Earle Duncan Getchell, Jr., MCGUIRE, WOODS, BATTLE & BOOTHE, L.L.P., Richmond, Virginia, for Appellee. **ON BRIEF:** Bradford M. Young, CHANDLER, FRANKLIN & O'BRYAN, Charlottesville, Virginia, for Appellant. Roswell Page, III, MCGUIRE, WOODS, BATTLE & BOOTHE, L.L.P., Richmond, Virginia; Richard J. Cromwell, MCGUIRE, WOODS, BATTLE & BOOTHE, Norfolk, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

LUTTIG, Circuit Judge:

Appellant Sharin Brown was severely injured when she lost control of her 1991 Ford Ranger pickup truck and it rolled several times. Brown sued appellee Ford Motor Company for breach of implied warranty and negligent design arising out of Ford's design, manufacture, and marketing of the Ranger. A jury rendered verdict in favor of Ford and Brown appeals, contending that the district court violated Va. Code Ann. § 46.2-1094(D) when it permitted Ford to introduce evidence that she was not wearing her seat belt at the time of the accident. For the reasons that follow, we affirm.

I.

Brown was driving her 1991 Ford Ranger pickup truck on a stretch of road in Suffolk, Virginia, when she encountered loose gravel that caused her to lose control of her truck. The truck slid and rolled several times. Brown was ejected and sustained severe injuries.

Brown subsequently filed suit in the Eastern District of Virginia, alleging that Ford was liable for her injuries, in both contract and tort. J.A. 24-28. Shortly before trial, Brown and Ford filed competing motions in limine to determine the admissibility of evidence of seat belt nonuse under Virginia statute. See Va. Code Ann. § 46.2-1094(D). After oral argument on the motions, the magistrate judge ruled that the jury could consider Brown's failure to wear her seat belt, but only in its consideration of the following issues:

> Whether the truck, taken as a whole, was designed negligently,
>
> Whether the defect alleged by the plaintiff was the proximate cause of the injury to the plaintiff or whether any failure to use a seat belt was the proximate cause of the injury,
>
> Whether the plaintiff misused the product.

J.A. 37. Brown filed a written objection to the magistrate judge's ruling, which was overruled by the district court. J.A. 79-80.

At trial, Brown was the first to raise the issue of seat belt use, responding during her cross-examination that she habitually wore her seat belt. J.A. 129. David Brown, appellant's husband, testified to the same during his direct examination. Thereafter, Ford, in presenting its case, elicited testimony from both the investigating officer and an

expert witness that Brown was unrestrained at the time of the accident in question. J.A. 137-38, 192. In closing argument, Ford's counsel emphasized on several occasions that "[i]f Mrs. Brown had been belted in her seat she would not have been injured or ejected." J.A. 268, 283, 286.

At the conclusion of trial, the district court instructed the jury that it could consider evidence of seat belt nonuse in determining whether Ford "negligently designed the motor vehicle" and "in whether the motor vehicle as manufactured and sold was reasonably safe when used for its intended purpose and also in determining whether the plaintiff misused the motor vehicle." J.A. 255. The district court cautioned the jury, however, that it could not find Brown contributorily negligent based upon a finding that she had not been wearing her seat belt. J.A. 255.

The jury returned a verdict in Ford's favor on Brown's claims of negligent design and breach of warranty. J.A. 301. Brown then filed a motion seeking a new trial, maintaining, inter alia, that the district court's limited admission of evidence of seat belt nonuse contravened section 46.2-1094(D) of the Virginia Code. The motion for a new trial was denied, and this appeal followed. J.A. 317.

II.

This case arises under our diversity jurisdiction, and we are therefore obliged, under Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), to apply state substantive law and federal procedural law. Brown argues on appeal, as she did below, that section 46.2-1094(D) of the Virginia Code is a substantive provision of law that mandates that evidence of seat belt nonuse is inadmissible for any purpose. Ford, on the other hand, argues that section 46.2-1094(D) is a procedural provision only. We find it unnecessary to resolve

whether section 46.2-1094 is substantive or procedural, however, because we hold that section 46.2-1094 did not bar Ford from presenting evidence at trial merely that Brown was not wearing her seat belt at the time of the accident.

Section 46.2-1094(A) of the Virginia Code requires every person who is at least 16 years of age and who occupies the front seat of a motor vehicle "to wear the appropriate safety system at all times while the motor vehicle is in motion on any public highway." Va. Code Ann. § 46.2-1094(A). Section 46.2-1094(C) subjects any person "who violates this section . . . to a civil penalty of twenty-five dollars." Id. § 46.2-1094(C). Section 46.2-1094(D), with which we are concerned here, in turn provides that,

> [a] violation of this section shall not constitute negligence, be considered in mitigation of damages of whatever nature, be admissible in evidence or be the subject of comment by counsel in any action for the recovery of damages arising out of the operation, ownership, or maintenance of a motor vehicle, nor shall anything in this section change any existing law, rule or procedure pertaining to any such civil action.

Id. (emphasis added).

Neither the first nor the second clause of section 46.2-1094(D) is implicated in the case before us. As noted, the district court expressly instructed the jury that it could not find Brown contributorily negligent based upon a finding that she had not been wearing her seat belt at the time of the accident. J.A. 255. Thus, the jury was not permitted to find Brown negligent based

upon a "violation of [section 46.2-1094]," however this phrase is construed. Moreover, the district court did not permit the jury to consider the evidence of Brown's seat belt nonuse on an issue of whether Brown's injuries would have been less serious had she been wearing her seat belt; rather, the district court permitted consideration of seat belt nonuse only on the questions of whether the overall safety system of the Ford Ranger was defectively or negligently designed. Thus, neither was "a violation of [section 46.2-1094]" -- again, however this phrase is construed -- "considered in mitigation of damages."

The only question before us is whether "[a] violation of [section 46.2-1094]" was impermissibly "admi[tted] in evidence" or allowed to be "the subject of comment by counsel" within the meaning of section 46.2-1094(D) when the district court allowed Ford to introduce its contested evidence of Brown's seat belt nonuse. Although we, like the district court, are without reported cases construing section 46.2-1094 from the Commonwealth to aid in our interpretation, we are satisfied that it was not.

We acknowledge that the phrase "[a] violation of [section 46.2-1094]" in section 46.2-1094(D) may plausibly be construed to refer to the underlying conduct that is proscribed by section 46.2-1094 -- namely, the nonuse of a seat belt while a motor vehicle is in motion. That is, we do not think it unreasonable to read section 46.2-1094(D) as prohibiting admission or comment by counsel upon mere evidence of seat belt nonuse, as appellant argues the section should be read. On balance, however, we are convinced that the better interpretation of this phrase is as a reference to an official determination that the provision has been violated, such as a law enforcement officer's citation for seat belt nonuse (or at least his conclusion to that effect) or a formal administrative or judicial finding of nonuse. We therefore believe that section 46.2-1094(D) as a whole is most

appropriately understood as forbidding only the admission into evidence or comment upon such an official determination that the section was violated, and at most as forbidding admission of or comment upon evidence that would be sufficient to establish all of the elements of a violation of the section. Because section 46.2-1094 does not categorically prohibit seat belt nonuse by all persons under all circumstances, but, rather, prohibits nonuse only by specified persons in specified circumstances, see Va. Code Ann. § 46.2-1094(A) (requiring seat belt use only by persons over age sixteen who are in the front seat of a vehicle moving on a public highway); id. at § 46.2-1094(B) (exempting eight classes of persons from the statute), evidence of mere seat belt nonuse, in and of itself, in no sense at all constitutes evidence of "a violation" of the statute.

Not only is this understanding of section 46.2-1094(D) most consonant with the plain language enacted by the state legislature, but its correctness is confirmed by a reading of the Commonwealth's statutes in pari materia. When the Virginia legislature has intended to prohibit the admission into evidence of mere seat belt nonuse, either generally or for specific purposes, it has done so plainly and unequivocally in terms that not only unmistakably capture that intent, but also distinguish that intent from the different intent that we conclude is evident in section 46.2-1094(D). Perhaps most notable in this regard is Va. Code § 46.2-1092, which limits the purposes for which evidence of seat belt nonuse after installation may be used. In that statute, for example, the legislature specifically identified seat belt nonuse as that which may not be considered, providing as follows:

> Failure to use the safety lap belts or a combination of lap belts and shoulder harnesses after installation shall not be deemed to be negligence. Nor shall evidence of such nonuse of such devices be considered in mitigation of damages of whatever nature.

(Emphasis added).[1] Given the striking substantive, textual, and structural parallels between this section and section 46.2-1094(D), the legislature's different word choice in the later-enacted section 46.2-1094(D) must be regarded as significant. See, e.g., 2A N. Singer, Statutes and Statutory Construction § 46.06 (6th ed. 2000) (noting that use of different "terms within related statutes generally implies that different meanings were intended"). If the legislature had intended in section 46.2-1094 to forbid admission of any and all evidence of seat belt nonuse, we must assume that it would have invoked language to the effect of that employed in section 46.2-1092, if not that language precisely.

The dissent finds convincing as to the meaning of the phrase "a violation of this section" the implied distinction between a "citation" and "a violation of this section" found in Va. Code § 46.2-1094(F). Even absent Va. Code § 46.2-1092, we would not subscribe to this admitted distinction the significance that the dissent does because, among other reasons, an official determination of a violation always

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[1] Other states have similarly enacted statutes that unequivocally bar evidence of seat belt nonuse, rather than premising inadmissibility on a "violation" of statute. See, e.g., Conn. Gen. Stat. Ann. § 14-100A ("Failure to wear a seat safety belt shall not be considered as contributory negligence nor shall such failure be admissible evidence in any civil action."); Kan. Stat. Ann. § 8-2504 ("Evidence of failure of any person to use a safety belt shall not be admissible in any action for the purpose of determining any aspect of comparative negligence or mitigation of damages."); Okla. Stat. Ann. § 12-420 ("[T]he use or nonuse of seat belts shall not be submitted into evidence in any civil suit in Oklahoma.").

precedes the issuance of a citation for that determined violation. Even more importantly, however, unlike Va. Code § 46.2-1092, which is virtually identical in all relevant respects to Va. Code § 46.2-1094(D), Va. Code § 46.2-1094(F) is not substantively, textually, or structurally like Va. Code § 46.2-1094(D), and consequently is a comparatively poor provision from which to infer the legislature's intent as to section 46.2-1094(D).

Accordingly, because Ford's evidence of Brown's nonuse of her seat belt did not, in and of itself, constitute evidence of "a violation of [section 46.2-1094],"[2] the district court's admission into evidence of that evidence did not contravene section 46.2-1094(D). The judgment of the district court therefore is affirmed. [3]

AFFIRMED

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[2] We believe that the dissent simply must indulge in too much inference and appellate trial of the case to reach definitively the conclusion that evidence was in fact introduced that would establish each and every element of the offense to the satisfaction of the jury. It bears noting that the ultimate question here is not whether it is fair to believe that these elements could have been proven, but, rather, whether, as a technical matter of law, evidence to prove every element of the offense was in fact properly introduced. This, we are confident, cannot be said.

[3] Brown also argues on appeal that the district court abused its discretion when it denied Brown's request to clarify that her traffic offenses arising out of the accident were later dismissed. Although Ford was the first party to mention the charges during opening argument, it did so because they were included within a police accident report that was a stipulated exhibit. Even if Ford's statement about the charges was improper, the district court offered to provide a curative instruction, an offer that Brown ultimately declined. It also ordered the parties to submit a redacted version of the exhibit. Given these actions by the district court, we cannot conclude that the court abuses its discretion in denying Brown's request to clarify the disposition of her traffic charges.

WILLIAMS, Circuit Judge, dissenting:

The majority reads Va. Code Ann. § 46.2-1094(D) to forbid only the admission into evidence, or comment by counsel upon, an official determination that Va. Code Ann. §46.2-1094's requirement of seat belt use has been violated, or "at most" to forbid admission of, or comment on, evidence that would establish all of the elements of a violation of § 46.2-1094. Majority Op. at 5-6. Because the majority's first interpretation of § 46.2-1094(D) would not obtain under traditional methods of statutory construction, and because the majority's second interpretation supports a finding of error on the facts of this case and undermines the majority's rationale for its first interpretation, I respectfully dissent.

I.

A.

Va. Code Ann. § 46.2-1094(D) states that "[a] violation of this section shall not constitute negligence, be considered in mitigation of damages of whatever nature, be admissible in evidence or be the subject of comment by counsel in any action for the recovery of damages arising out of the operation of a motor vehicle." Va. Code Ann. § 46.2-1094(D) (Michie 1998). The majority asserts that the best reading of this provision is that it merely prohibits the admission of evidence of an "official determination that the provision has been violated, such as a law enforcement officer's citation for seat belt nonuse (or at least his conclusion to that effect) or a formal . . . finding of nonuse."[1]

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[1] I note that if an officer's "conclusion to [the] effect" of "seatbelt non-use" constitutes an official determination of a violation, such an official determination was introduced at trial. The investigating officer, Ronald Kline, testified that he determined from the evidence at the accident scene that Ms. Brown had not been wearing her seat belt, and checked a box on the accident report form indicating his conclusion that she had been unbelted. (J.A. at 143).

Majority Op. at 5. Yet, this reading, which equates a "violation" with a citation or an official determination of a violation, is at odds with the ordinary legal meaning of the word "violation." The Supreme Court, based upon the definition offered by a leading legal dictionary, has defined "violation" to mean" an act or conduct that is contrary to law." See Richardson v. United States, 526 U.S. 813, 818 (1999) (citing BLACK'S LAW DICTIONARY 1570 (6th ed. 1990)).

Further, as the majority notes, the use of different terms within related statutory provisions gives rise to an implication that different meanings were intended. See Majority Op. at 7 (citing 2A N. Singer, Statutes and Statutory Construction § 46.06 (6th ed. 2000)). Here, Va. Code Ann. § 46.2-1094(D)'s reference to a"violation of this section" contrasts with § 46.2-1094(F)'s explicit reference to the issuance of a "citation for a violation of this section." Thus, one may be cited "for a violation" – implying that "a violation" refers to something other than the official determination of a violation itself. The statute itself discusses "a violation" as antecedent to, and distinct from, a citation for a violation. The structure of § 46.2-1094 and the ordinary legal meaning of the word "violation" thus lead me to conclude that "a violation" of § 46.2-1094 as used in § 46.2-1094(D) refers to the conduct that establishes all of the elements of a violation of § 46.2-1094 rather than to the fact of an official citation or adjudication of a violation.

B.

In its alternative holding, the majority suggests the correctness of just this interpretation of § 46.2-1094(D), and leads me to conclude that error has occurred on the facts of this case. See Majority Op. at 5-6 (interpreting § 46.2-1094(D) "at most as forbidding admission of or comment upon evidence that would be sufficient to establish all of the elements of a violation.").

Va. Code Ann. § 46.2-1094 requires all persons "at least sixteen years of age and occupying the front seat of a

motor vehicle equipped or required . . . to be equipped with a safety belt system" to wear the safety belts "at all times while the motor vehicle is in motion on any public highway." Va. Code Ann. § 46.2-1094(A). Further, the statute provides eight specific exceptions: Seat belt use is not required of (1) persons for whom a physician has determined use would be medically impractical, provided that such persons carry a signed written statement to this effect; (2) law-enforcement officers when use would be impractical; (3) persons performing the duties of a rural mail carrier; (4) persons performing the duties of a newspaper carrier; (5) drivers of taxicabs; (6) commercial or municipal delivery persons; (7) persons performing the duties of a utility meter reader, or (8) law enforcement personnel enforcing parking laws. See Va. Code Ann.§ 46.2-1094(B) (enumerating these eight exceptions).

The majority reasons that "evidence of mere seat belt nonuse" does not fall within the ambit of § 46.2-1094(D) because § 46.2-1094 does not require use of seatbelts in all cases. Majority Op. at 6. In this case, however, evidence was introduced at trial which would be sufficient to establish each element of a violation of § 46.2-1094.[2] Evidence was introduced at trial showing that Sharin Brown was (A) a person; (B) at least 16 years of age (a compelled inference from the fact that her sixteen-year-old son was in the passenger seat) (J.A. at 108, 174), (C) occupying the front seat (she was driving) (J.A. at 111), of (D) a vehicle equipped with seat belts (J.A. 191-92), (E) who was not belted, (J.A. at 143), (F) while traveling on a public highway (J.A. at 123-24). Thus, each of the elements set forth in § 46.2-1094(A) was established at trial. As to the exceptions enumerated in §46.2-1094(B), the evidence introduced at trial establishes

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[2] The issue is not whether each element was established "to the satisfaction of the jury," Majority Op. at 7 n.2. Instead, the proper focus of the inquiry is on whether evidence which would, if credited by the jury, prove each element of a violation was introduced ; § 46.2-1094 regulates the introduction of evidence and comment by counsel, not the jury's process of weighing evidence.

that Ms. Brown was driving with her son on a weekend trip to the doctor's office and a local shopping center, refuting any contention that Ms. Brown was eligible for the exceptions available to law-enforcement officers, rural mail carriers, newspaper carriers, taxi drivers, delivery persons, utility meter readers, or law enforcement personnel enforcing parking laws. (See, e.g., J.A. at 107-08) (describing the personal nature of Ms. Brown's trip.) Thus, evidence introduced at trial was sufficient to establish all of the elements of a violation and to negate seven of the eight exceptions provided in § 46.2-1094(B). The remaining exception, for persons whose use of a seatbelt has been judged impractical by a physician due to a medical condition, would seem to be an affirmative defense rather than an element of a violation of§ 46.2-1094. It cannot be the Commonwealth of Virginia's burden to establish in an enforcement action under § 46.2-1094 that a person charged with violating that section has not been certified as exempt by any doctor. Thus, evidence sufficient to establish each of the elements of a violation of § 46.2-1094 was introduced at trial.[3]

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[3] Further, the majority's alternative holding powerfully undercuts the force of the majority's argument that its approach is supported by the need to attach significance to the legislature's different word choice in related sections of the Virginia Code. The majority notes that Va. Code Ann. § 46.2-1094(D) refers to a "violation of this section," whereas Va. Code Ann. § 46.2-1092 refers to "failure to use the safety lap belts." Thus, the majority reasons that "the legislature's different word choice in the later-enacted section 46.2-1094(D) must be regarded as significant," supporting the conclusion that § 46.2-1094(D) does not forbid mere evidence of seat belt nonuse. See Majority Opinion at 7. But, the majority's alternative holding succeeds in respecting the legislature's different choice of words; "failure to wear the safety lap belts" is broader than a "violation" of § 46.2-1094, because the elements of a § 46.2-1094 violation exclude some instances of failure to wear a seat belt, such as cases in which one is not occupying the front seat of a vehicle, is under 16 years of age, or is not traveling on a public highway. The need to attach significance to the legislature's different word choice does not provide a good reason for preferring the majority's first interpretation over its second one, and for the reasons I have stated, I believe the majority's second interpretation supports a finding of error.

II.

Because I conclude that § 46.2-1094 by its terms forbids the introduction of the evidence presented at trial in this case, I find it necessary to address whether § 46.2-1094 is a substantive provision that governs in the federal courts, or is instead a mere procedural rule that is inapplicable in the federal courts. I would hold that the Virginia provision at issue is inextricably bound up with a substantive Virginia policy of refusing to attach liability in cases arising out of motor vehicle accidents to a party's failure to wear a seatbelt as required by law and thus governs in federal courts adjudicating claims that arise under Virginia law. I note at the outset that although§ 46.2-1094(D) comes without the benefit of extensive legislative history or a rich tradition of Virginia caselaw illuminating the scope of the substantive policy that it embodies, the Virginia Supreme Court has held that a single statutory provision enacted by the Virginia General Assembly is sufficient to establish a public policy of Virginia. See Lawrence Chrysler Plymouth v. Brooks, 465 S.E.2d 806, 808 (Va. 1996). Further, § 46.2-1094(D) is arguably a reaction to a federal court ruling stating that a predecessor provision, which stated only that failure to wear a seat belt did not constitute evidence of negligence, did not bar admission of evidence of seat belt nonuse relative to the issue of overall safe product design. See Wilson v. Volkswagen of Am. , 445 F. Supp. 1368, 1374 (E.D. Va. 1978). The Wilson court pointed to a Minnesota statute prohibiting the introduction of seat belt nonuse evidence for any purpose whatsoever "in any litigation involving personal injuries or property damage resulting from the use or operation of any motor vehicle" as an example of how Virginia would have to write its statute in order for it to prohibit the introduction of seatbelt nonuse evidence on the issue of overall design safety. See id. (quoting Minn. Stat. Ann. § 169.685(4)). Following Wilson, the Virginia Legislature enacted § 46.2-1094(D), using

language which, in substance, tracks the language the Wilson court stated would be necessary to bar the introduction of seatbelt nonuse evidence as to issues of overall design safety.

Now that Virginia has responded to the federal courts by broadening the scope of its seatbelt evidence exclusion to remove all ambiguity in cases such as these, the majority holds that evidence of a "violation" of § 46.2-1094 is to be read so narrowly as to permit the introduction of evidence of seatbelt nonuse in most cases. I believe that the remarkable similarity between the language of the Minnesota statute cited in Wilson and the later-enacted § 46.2-1094(D) gives rise to an inference that § 46.2-1094(D) was in part a reaction to the Wilson decision -- and that inference, along with the plain language of the statute, convinces me that § 46.2-1094(D) reflects a considered substantive policy of the state of Virginia, which it is the duty of the federal courts to effectuate in a diversity action.

As a general matter, of course, the Federal Rules of Evidence, and not state law, govern the admissibility of evidence in diversity actions in the Federal courts. See Scott v. Sears, Roebuck & Co., 789 F.2d 1052, 1054 (4th Cir. 1986). The Federal Rules of Evidence come with an implied "prima facie judgment" of the Supreme Court, the Advisory Committee on the Rules of Evidence, and the Congress that "the rule in question transgresses neither the terms of the Rules Enabling Act nor constitutional restrictions." Hanna v. Plumer, 380 U.S. 460, 471 (1965) (addressing the Federal Rules of Civil Procedure). Despite this heavy presumption, however, numerous courts have held that in an action arising under state law, the Federal Rules of Evidence yield to specific state provisions which can be characterized as embodying the substantive policy of a state regarding liability standards under state law. See, e.g., Hottle v. Beech Aircraft Corp., 47 F.3d 106, 109-10 (4th Cir. 1995) (holding that a Virginia common-law rule barring admission of a

party's internal rules and policies in a negligence action, rather than the Federal Rules of Evidence, governed the admissibility of a party's internal manual in a products liability suit); Gardner v. Chrysler Corp., 89 F.3d 729, 733 (10th Cir. 1996) (holding that a Kansas statute prohibiting admission of seatbelt evidence "for the purpose of determining any aspect of comparative negligence or mitigation of damages" was substantive and governed in federal court); Barron v. Ford Motor Co., 965 F.2d 195, 199 (7th Cir. 1992) (stating that to the extent a North Carolina rule excluding evidence of seat belt nonuse is "designed not to penalize persons who fail to fasten their seatbelts," as opposed to reflecting accuracy and economy concerns in litigation, it is a substantive rule and governs in federal court). Thus, despite the general presumption that the Federal Rules of Evidence govern in federal court, numerous courts have recognized that a federal court sitting in diversity can be obligated to follow state provisions that represent substantive state policy judgments as to the appropriate nature of state-law liabilities.[4] This principle reflects the desire to avoid the rampant forum-shopping and inequitable treatment of litigants based upon diversity status that would obtain if diversity litigants in federal court, but not nondiverse litigants in state courts, could avail themselves of a fundamentally different set of liability rules. See Hanna, 380 U.S. at 467 (noting the fairness and

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[4] If a state rule is substantive, defining the nature of state-law liabilities, the question in this case would not appear to be whether to apply a state evidentiary rule or a "conflicting" Federal Rule of Evidence. Under the Federal Rules, relevance is defined by reference to the legal characteristics of the claim being litigated. Fed. R. Evid. 401 (defining relevance by reference to facts "of consequence to the determination of the action"). Thus, if a violation of Virginia's seatbelt law is substantively not a basis for liability of any kind in a suit arising from the operation of a motor vehicle, such evidence would be irrelevant because it is not "of consequence to the determination of [an] action" based solely on Virginia law. Cf. Hanna v. Plumer, 380 U.S. 460, 470 (1965) (noting that where the scope of a Federal Rule of Civil Procedure is not construed as sufficiently broad to create a conflict with state law, Erie analysis applies).

forum shopping difficulties which inhered in the pre-Erie regime). Further, it is not the goal of diversity jurisdiction to impede the ability of states to establish, for consistent application in suits grounded on state law, substantive liability policies reflecting the judgments of the state's legislative institutions, regardless of our opinion as to the wisdom of these policies.

Thus, under this Circuit's rule in Hottle, "there are circumstances where a question of admissibility of evidence is so intertwined with a state substantive rule that the state rule . . . will be followed in order to give full effect to the state's subsantive policy." Hottle, 47 F.3d at 109 (quoting DiAntonio v. Northampton-Accomack Memoral Hosp., 628 F.2d 287, 291 (4th Cir. 1980)). The Hottle Court reasoned that "when a state evidentiary rule either embodies or is closely tied to a state substantive policy . . . application of the federal rule of evidence, although beyond argument procedural, may encroach upon the state's substantive law." Id. at 109-10.

Here, the district court attempted to walk a delicate line between forbidden and permitted uses of seatbelt evidence. The district court concluded that Va. Code Ann. § 46.2-1094(D)'s proscription on use of evidence of a "violation of this section" as proof of negligence or in mitigation of damages was clearly substantive, but held that evidence of a violation could be considered by the jury on the issues of (1) negligent vehicle design, (2) whether the truck was reasonably safe as to Ms. Brown's breach of warranty claim, and (3) whether Ms. Brown misused the vehicle relative to her warranty claim.[5] If, however, the "substantive" portion

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[5] I note that Ms. Brown did not try this case on a crashworthiness theory. Cf. Barron v. Ford Motor Co., 965 F.2d 195 (7th Cir. 1992) (holding that under a narrower North Carolina rule, which the court interpreted to forbid admission of evidence of seatbelt nonuse "to establish the plaintiff's failure to exercise due care to minimize the consequences of an accident," evidence of seatbelt nonuse could be introduced to show the crashworthiness of a vehicle's total restraint system in response to a claim that a vehicle was not crashworthy).

of Virginia's statute prohibits introduction of evidence of a violation for the purposes of establishing comparative negligence or failure to mitigate damages, then Hottle forbids any uses of such evidence which are "so intertwined" with Virginia's substantive policy as to require that the state rule be followed to give Virginia's policy full effect. Hottle, 47 F.3d at 110. The district court's permitted uses of the evidence in question are either in direct contravention of a substantive Virginia policy forbidding the use of evidence of a "violation" to ground liability in an action arising from the use of a motor vehicle, or, at a minimum, are sufficiently "intertwined" with the substantive components of Va. Code Ann. § 46.2-1094(D) to require application of the Virginia statute in this case.

I thus conclude that § 46.2-1094(D) governs this dispute by its terms and is applicable in federal court under Hottle. Because the record before the Court supports a finding of reversible error under the majority's alternative interpretation of Va. Code Ann. § 46.2-1094(D), I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Sharin C. BROWN,
Plaintiff,

v.

FORD MOTOR COMPANY,
a Delaware corporation,
Defendant.

Civ.A. No. 298CV880.

Entered Oct. 12, 1999.

ORDER

This matter came before the Court on the Plaintiff's Motion for a New Trial ("Plaintiff's Motion"). For the reasons set forth herein, the Court **FINDS** that a hearing is not necessary to address the Plaintiff's Motion. The Court further **DENIES** the Plaintiff's Motion and **ORDERS** that judgment be entered for the Defendant in accordance with the jury verdict rendered on June 2, 1999.

I. Factual and Procedural History

On August 5, 1998, the Plaintiff, Sharin C. Brown ("Plaintiff" or "Brown"), filed a Complaint which named Ford Motor Company, a Delaware corporation with its principal place of business in Detroit, Michigan, as the Defendant ("Defendant" or "Ford"). The Plaintiff's Complaint alleges that Brown was injured in a rollover accident on August 12, 1996, in Suffolk, Virginia, while driving a 1991 Ford Ranger 4 x 2 pick-up truck ("Ranger").

Brown suffered multiple injuries. Two theories of recovery survived pre-trial motions and were submitted to the jury: (1) that the Defendant negligently designed and manufactured the Ranger, proximately causing Brown's injuries; and (2) that the Defendant breached implied warranties that the Ranger was fit and safe for its intended purpose. The Plaintiff sought compensatory damages, punitive damages, attorneys' fees, and court costs.

The trial began on May 24, 1999, and the jury returned a verdict for the Defendant on both claims on June 2, 1999. At that time, the Court declined to enter judgment, granting the parties leave to file post-trial motions addressing its rulings on the admissibility of evidence relating to the Plaintiff's and her passenger's use or nonuse of her seatbelt on August 12, 1996. The Plaintiff filed a Motion for a New Trial on June 15, 1999. The Defendant filed its Response on June 29, 1999, and the Plaintiff filed her Reply on July 2, 1999.

II. The Court's Seatbelt Ruling at Trial

Outside of the jury's presence, the Court heard argument and ruled that Virginia Code § 46.2-1092 and § 46.2-1094(D) were in derogation of the common law of Virginia that provides that violation of a statute is ordinarily negligence *per se*. The Court also ruled that these sections were contrary to the public policy of Virginia, which encourages seatbelt use. Accordingly, the Court found that these statutes should be strictly construed. The Court further ruled that the language of the statutes dictated that evidence of seatbelt use by either the Plaintiff or the passenger was admissible for all issues before the Court except the Plaintiff's alleged contributory negligence and her alleged failure to mitigate damages. Specifically, the Court ruled that the evidence of seatbelt use or nonuse was admissible as evidence of causation as to negligence or breach of warranty as well as to product misuse.

The Court instructed the jury regarding negligence and contributory negligence. Jury Instructions 13-17. However, the Court limited evidence of the Plaintiff's seatbelt use in Jury Instruction 18, instructing the jury that:

> [i]n determining certain of the issues in this case, one of the elements of evidence which you may consider is the question of whether or not the plaintiff was wearing a seatbelt when her motor vehicle rolled over.
>
> With regard to the plaintiff's negligence claim, you may consider the use or non-use of the seatbelt in determining whether the defendant negligently designed the motor vehicle, but you may not find the plaintiff guilty of contributory negligence based upon a finding that she was not wearing her seatbelt when her motor vehicle rolled over.
>
> With regard to the plaintiff's breach of warranty claim, you may consider the use or non-use of the seatbelt in determining whether the motor vehicle as manufactured and sold was reasonably safe when used for its intended purpose and also in determining whether the plaintiff misused the motor vehicle.[1]

Jury Instruction 18. The Court also instructed the jury regarding the Plaintiff's breach of warranty claim and the Defendant's product misuse defense. Jury Instructions 23-26.

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[1] There was other evidence of Plaintiff's contributory negligence and misuse of the Ranger including evidence of both excessive speed for the road conditions and lack of control of the truck in a curve.

III. The Plaintiff's Motion for a New Trial

The Plaintiff's Motion contends that the Court should order a new trial because (1) admission of seatbelt nonuse is prohibited under Virginia law and (2) even if such evidence were admissible to demonstrate the total design package of the Ranger, the jury instructions failed to limit that evidence sufficiently and were thus in plain error. In support of her first contention, the Plaintiff argues that Virginia Code § 46.2-1094(D) (" § 46.2-1094(D)") bans the introduction of seatbelt evidence for any purpose in any case arising out of the operation of a motor vehicle. The Plaintiff argues that her case arose out of the operation of a motor vehicle because she could not have been injured without operating the Ranger, and the Court's construction of § 46.2-1094(D) effectively limited it to the scope of Virginia Code § 46.2-1092. The Plaintiff argues that § 46.2-1094(D) has a farther reach than § 46.2-1092. She further contends that the introduction of the seatbelt evidence was harmful error which affected the jury's verdict.

In support of her second contention, the Plaintiff argues that the Court's instructions failed to explain to the jury the limited role of the evidence and that such a failure is plain error amounting to fundamental unfairness. Specifically, the Plaintiff argues that the Court's instructions failed to distinguish between misuse and negligence. Plaintiff further argues that the Court's instructions overemphasized misuse as a defense to the warranty claim, while minimizing the prohibition of seatbelt evidence in the consideration of the Plaintiff's contributory negligence. The Plaintiff cites *Siren v. Behan* for her contention that the Court mis-instructed the jury as to the limitations of the seatbelt evidence. 224 N.J.Super. 130, 539 A.2d 1244, (App.Div.), *remanded for reconsideration on other grounds*, 113 N.J. 323, 550 A.2d 442 (1988). First, the Plaintiff argues that the Court should have instructed the jury of Ford's burden to produce evidence that Ford's designers considered the availability of

the seatbelt in making the decision to use the twin I-beam suspension in the Ranger. Second, the Plaintiff argues that the jury should have been instructed to factor into its deliberations whether Ford took into consideration the fact that a significant portion of the population does not wear seatbelts. These arguments were not advanced during the charging conference.

The Defendant's Response contends that the Plaintiff's Motion should be denied because: (1) her arguments are appellate in nature and insufficient to grant a new trial; (2) the Court properly applied the Virginia statutes; (3) her allegations concerning the limiting instruction are moot because the Verdict Form indicates that the jury did not consider evidence of seatbelt nonuse on the issues of contributory negligence or product misuse; and (4) the Plaintiff waived her objection to the efficacy of the Court's limiting instruction because she did not object to the instruction at trial. The Plaintiff's Reply argues that she has alleged sufficient grounds for a new trial.

IV. Analysis

A. Federal Rule of Civil Procedure 59

Federal Civil Rule of Procedure 59 ("Rule 59") permits the Court to grant a new trial in certain circumstances. Specifically, Rule 59(b) provides that "[a]ny motion for a new trial shall be filed no later than 10 days after entry of the judgment." *Fed.R.Civ.P.* 59(b). The Fourth Circuit has held in an unpublished opinion that a Rule 59 motion for a new trial may be made before the entry of judgment under the language of the rule. *Redic v. H. Watts*, Nos. 86-3824, 86-3869, 1988 WL 118149, at *3 (4th Cir. Nov.2, 1988) (unpublished opinion, cited in Table at 862 F.2d 314) (citing 6A Moore, 2d Ed. ¶ 59.09[1] at 59-221). A court must set aside a verdict and grant a motion under Rule 59 if it is of the opinion that (1) the verdict is against the clear weight

of the evidence, (2) the verdict is based upon evidence that is false, or (3) the verdict will result in a miscarriage of justice, even though there may be substantial evidence that would prevent the direction of a verdict. *Atlas Food Systems and Services, Inc. v. Crane National Vendors, Inc.*, 99 F.3d 587, 594 (4th Cir.1996). Because Plaintiff's Motion alleges that entry of judgment upon the jury's verdict will result in a miscarriage of justice, the Court will consider her two contentions.

B. The Admissibility of the Seatbelt Evidence at Trial

Virginia Code § 46.2-1092 provides that "[f]ailure to use the safety lap belts or a combination of lap belts and shoulder harness after installation shall not be deemed to be negligence. Nor shall evidence of *585 such nonuse of such devices be considered in mitigation of damages of whatever nature." Another section of the Virginia Code, § 46.2-1094(A), makes it illegal for an occupant of the front seat of a motor vehicle who is sixteen or older to fail to wear his or her seatbelt. Subsection D of § 46.2-1094 provides that

> [a] violation of this section shall not constitute negligence, be considered in mitigation of damages of whatever nature, be admissible in evidence or be the subject of comment by counsel in any action for the recovery of damages arising out of the operation, ownership, or maintenance of a motor vehicle or any relating criminal statute.

Va.Code § 46.2-1094(D).

In determining the applicability of § 46.2-1094(D) in a case such as this where jurisdiction is based on diversity, the Court must first consider whether it is a substantive or procedural rule of law. A federal court sitting in diversity

jurisdiction must apply the substantive law of the forum state, including that state's choice of law rule. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Procedural rules generally are not subject to *Erie*, and federal law governs. *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965). However, a federal court may adopt a state exclusionary rule where the rule embodies substantive state policy. *See, e.g., Ricciardi v. Children's Hosp. Medical Center*, 811 F.2d 18, 21 (1st Cir.1987); *In re Air Crash Disaster Near Chicago, Illinois, on May 25, 1979*, 803 F.2d 304, 313-14 (7th Cir.1986); *Conway v. Chemical Leaman Tank Lines, Inc.*, 540 F.2d 837, 839 (5th Cir.1976).

By its own terms, the Virginia statute contemplates both substantive and procedural elements. Section 46.2-1094(D) concludes with a statement that nothing in that section shall "change any existing law, rule, or procedure pertaining to any such civil action." The first two elements of § 46.2- 1094(D), concerning contributory negligence and mitigation of damages, refer to a plaintiff's substantive rights. The last element of § 46.2-1094(D), however, is procedural in that it deals with admissibility of evidence and comment of counsel.

Under Virginia law, statutes in derogation of the common law must be strictly construed. *Sabre Construction Corporation v. County of Fairfax*, 256 Va. 68, 501 S.E.2d 144, 147 (1998) (holding that the Public Procurement Act constituted a waiver of sovereign immunity in derogation of the common law, and thus it must be strictly construed) (citation omitted). Although prior to the enactment of § 46.2-1094(D) common law in Virginia had proscribed the admission of evidence of failure to wear a seatbelt to demonstrate the injured party's negligence in automobile cases, such evidence was admissible to reduce defendant's damages. *See Wilson v. Volkswagen of America*, 445 F.Supp. 1368, 1372-74 (E.D.Va.1978). Furthermore, § 46.2-1094(D) deviates from current Virginia common law, which provides that violation of a statute, such as the law

requiring the use of seatbelts, ordinarily is negligence *per se*. Section 46.2-1094(D) is also in derogation of Virginia's current public policy of encouraging seatbelt use. Thus § 46.2-1094(D) is in derogation of state common law, and it must be strictly construed.

Neither Virginia nor the Fourth Circuit has interpreted the scope and nature of § 46.2-1094(D). A district court in the Western District of Virginia applied the Virginia statute to hold that evidence of the nonuse of a safety device cannot be used either in support of a defense to liability or in mitigation of damages. *Freeman v. Case Corporation*, 924 F.Supp. 1456, 1470 (W.D.Va.1996) *rev'd on other grounds*, 118 F.3d 1011 (4th Cir.1997) (products liability action against a tractor manufacturer holding that evidence of plaintiff's nonuse of the seatbelt was inadmissible). In *Freeman* the court stated that " § 46.2-1094(D) forbids evidence of nonuse of seatbelts in a motor vehicle with respect to both liability and damages." *Id.* at 1469. *Freeman* differs from the instant case, however, in that the defendant there wanted to introduce plaintiff's failure to wear a safety belt as evidence of plaintiff's negligence. Here the defendant used evidence of plaintiff's nonuse of her seatbelt to demonstrate that its product, the Ranger, taken as a whole, was not negligently designed and that it was fit for its intended purpose.

While the Fourth Circuit has not had occasion to interpret § 46.2- 1094(D), the Seventh Circuit discussed whether a similar North Carolina statute was a rule of evidence, and thus inapplicable in a diversity case, or whether it was a rule of substantive law, and therefore applicable. *Barron v. Ford Motor Co. of Canada*, 965 F.2d 195 (7th Cir.1992) (action against automobile manufacturer alleging negligence, strict liability, and breach of implied warranty); N.C.Gen.Stat. § 20-135.2A(d) ("evidence of failure to wear a seatbelt shall not be admissible in any criminal or civil trial, action, or proceeding except in an action based on a violation of this section."). The *Barron*

court concluded that "if [their] understanding of the scope of the rule is correct, then the rule is substantive .. because it is founded on the desire of the North Carolina courts not to penalize the failure to fasten one's seatbelt." *Id.* at 200. However, the court recognized that the substantive application of the statute was narrow and did not reach the question of whether evidence of seatbelt nonuse was admissible as a defense to plaintiff's allegations of negligent design or strict liability. The court held that evidence of seatbelt nonuse was admissible for defendant to demonstrate that it was reasonable in not making the sunroof out of laminated glass because it had provided a backup system in the form of seatbelts. *Id.*

Like the Seventh Circuit, a district court in Tennessee narrowly interpreted a seatbelt statute similar to Virginia's when it held that the Tennessee statute did not allow evidence of the nonuse of a seatbelt to be considered as evidence of contributory negligence, assumption of risk, or a failure to mitigate damages. *MacDonald v. General Motors Corp.*, 784 F.Supp. 486 (M.D.Tenn.1992) (products liability claim against manufacturer of van). In designating these limited areas of inadmissibility, the *MacDonald* court held that the statute did not preclude defendant from arguing that failure to use passenger restraint constituted proximate cause. *Id.* The Tennessee statute provided that "in no event shall failure to wear a safety belt be considered as contributory negligence, nor shall failure to wear a safety belt be admissible as evidence in a trial of any civil action." *Id.* at 490 (citing Tenn.Code Ann. § 55-9-604). The court read that statute in conjunction with another statute, Tenn.Code Ann. § 55-9-605, which stated that § 604 should not be construed to create strict liability. *Id.* at 499. The Court further stated that to prevent the defendant from introducing evidence that the plaintiff's injuries were caused by being thrown from the van would be a step toward absolute liability. *Id.* The *MacDonald* court also cited *LaHue v. General Motors Corp.*, 716 F.Supp. 407, 416 (W.D.Mo.1989)

(claiming defective design of car seats in products liability action against manufacturer), for the proposition that seatbelt evidence was relevant to the question of causation because a defendant should not be liable for harm which that defendant did not cause by way of a design defect. *Id.* at 499-500. The language of the Missouri statute is almost identical to Virginia's § 46.2-1094(D).

On the one hand, § 46.2-1094(D) provides that the failure to wear a seatbelt is not contributory negligence and may not be considered in mitigation of damages. On the other hand, § 46.2-1094(D) does not specifically limit seatbelt evidence in negligence or breach of warranty defective design claims, nor does it mention misuse of the product as a defense to warranty claims. Thus § 46.2-1094(D) impacts a plaintiff's substantive rights with respect to contributory negligence and mitigation of damages, but the statute's substantive power extends no further. In its silence with respect to negligence and breach of warranty, the statute does not disturb the procedural nature of admission of evidence and comment of counsel.

Insofar as § 46.2-1094(D) provides that failure to wear a seatbelt is not contributory negligence and may not be considered in mitigation of damages, it is substantive and thus controlling under *Erie v. Tompkins*. However, insofar as § 46.2-1094(D) limits the admissibility in evidence of the failure to wear a seatbelt or counsel's comment upon such failure with regard to issues other than contributory negligence and mitigation of damages, it is procedural and not controlling in the instant case. Because the admissibility of evidence and comments of counsel are procedural matters, this portion of the statute is not controlling, and this Court will not expand the substantive provision of the statute beyond its clear and unambiguous terms.

The Court **FINDS** this evidence is relevant to the design and misuse issues. There is no provision in the *Federal Rules of Evidence* that would limit the admissibility of the failure to wear a seatbelt upon these issues. Therefore,

the Court **FINDS** that evidence of the failure to wear a seatbelt is admissible as it relates to the issues of negligent design and manufacture, breach of warranty, and product misuse.

Prior to the enactment of §§ 46.2-1092 and 46.2-1094(D), evidence of nonuse of a seatbelt was admissible if ".. the defendant can demonstrate, by competent and satisfactory evidence, the extent of the plaintiff's injuries could have been avoided by wearing a seatbelt." *Chretien v. General Motors Corp.*, Nos. 90-2090, 90-2110, 1992 WL 67356, at *4 (4th Cir. April 6, 1992) (unpublished opinion, cited in Table as 959 F.2d 231) (quoting *Wilson v. Volkswagen of Am.*, 445 F.Supp. 1368, 1373 (E.D.Va.1978)). Recognizing the substantive nature of § 46.2-1094(D)'s proscribing the admissibility of nonuse of plaintiff's seatbelt as evidence of contributory negligence or in mitigation of damages, the Court prohibited the Defendant's expert witness Dr. Robert Piziali, a bio-mechanical engineer, from testifying that the Plaintiff's failure to wear a seatbelt exacerbated her injuries or that her ejection exacerbated her injuries.[2] With respect to the negligence of design and breach of warranty claims, however, the *Federal Rules of Evidence* govern. Thus the Court allowed Dr. Piziali to testify that the Plaintiff's failure to wear a seatbelt caused her to be ejected from the Ranger, and that the way a person lands after an ejection determines the forces that act on his or her body.

The Court **FINDS** that the limited admission of evidence relating to the Plaintiff's and her passenger's use or nonuse of their seatbelts was proper under the *Federal Rules of Evidence*. Accordingly, the Court **DENIES** the Plaintiff's Motion for a New Trial insofar as it is based on the evidentiary rulings regarding seatbelts.

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[2] The Court also found that DiPiziali was not qualified to testify as an expert upon the causation or exacerbation of injuries.

C. *The Jury Instruction Limiting the Use of Seatbelt Evidence*

The Plaintiff's second argument is merely an extension of her first argument. The Plaintiff has asserted that the jury instruction limiting the use of the seatbelt evidence was plain error. The Fourth Circuit has held that "[a] motion for a new trial should not be granted .. where the moving party has failed to timely object to the alleged impropriety giving rise to the motion." *Dennis v. General Electric*, 762 F.2d 365, 367 (4th Cir.1985). As the Defendant correctly noted in its Response, the Plaintiff did not object to the Court's limiting instruction when given the opportunity to do so at the charging conference. Therefore, the Court **FINDS** that the Plaintiff failed to timely object to the content of the Court's limiting instruction Number 18 regarding evidence of whether the Plaintiff was wearing a seatbelt on August 12, 1996.

The case cited by the Plaintiff in support of her contention that this Court committed plain error with its limiting instruction held that seatbelt evidence was admissible in a defective design case for the purposes of the jury's risk- utility analysis, but ordered a new trial because of the inadequacy of the jury instructions limiting the jury's consideration of that evidence. *Siren v. Behan*, 224 N.J.Super. 130, 539 A.2d 1244, 1248 (App.Div.), *remanded for reconsideration on other grounds*, 113 N.J. 323, 550 A.2d 442 (1988). Specifically, that court held that evidence of the recommended use of the seatbelt was admissible because the jury had to consider the product as an integrated whole, including the safety aspects of the product and the user's ability to avoid danger by the exercise of care in the use of the product. *Id.* at 1248 (citation omitted). That court also held that a limiting instruction, of the nature given in the subject case, was required. *Id.*

As to the Plaintiff's breach of warranty claim, under Virginia warranty law, a seller impliedly warrants that his product will be fit for the purposes for which it is ordinarily

used. *Beard Plumbing and Heating, Inc. v. Thompson Plastics, Inc.*, 254 Va. 240, 491 S.E.2d 731 (1997). If a plaintiff misused a product, he or she cannot recover for breach of a warranty. *Besser Co. v. Hansen*, 243 Va. 267, 415 S.E.2d 138 (1992).

The Court instructed the jury as to the elements of negligent design and of breach of the Defendant's implied warranty that the Ranger was reasonably safe for its intended purpose. Jury Instructions 13-16, and 23-25. The Court further instructed the jury that if it found the Plaintiff contributorily negligent, and such contributory negligence was the proximate cause of her injuries, then she could not prevail on her negligent design claim. Jury Instructions 17 and 19-22. However, the Court cautioned the jury that evidence upon the question of whether the Plaintiff was not wearing her seatbelt could not be considered in determining whether she was contributorily negligent. Jury Instruction 18. The instructions from which the jury could have found the Plaintiff contributorily negligent were not based upon the evidence that she may not have been wearing a seatbelt. As to the breach of warranty claim, the Court instructed the jury that if the plaintiff misused the motor vehicle, and such misuse was a proximate cause of her injuries and damages, then the jury should find for the Defendant. Jury Instructions 24 and 25.[3] Instruction 18 permitted the jury to consider the seatbelt evidence in deciding the misuse issue.

The Court **FINDS** that its jury instructions were proper. Therefore, the Court **DENIES** the Plaintiff's Motion for a New Trial on her second grounds. Accordingly, the Court **FINDS** that the jury's verdict of June 2, 1999, was supported by the law and the evidence, and it **DENIES** the Plaintiff's Motion for a New Trial.

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[3] Although the Court **FINDS** its instructions upon contributory negligence and product misuse proper, the special verdict form reveals that the jury found no negligent design or breach of warranty and did not consider contributory negligence and misuse of the product.

V. Conclusion

For the reasons set forth above, the Court **FINDS** that a hearing is not necessary to address the Plaintiff's Motion for a New Trial. The Court **ORDERS** that judgment be hereby entered for the defendant in accordance with the jury verdict.

The Clerk is **REQUESTED** to send a copy of this Order to counsel for both parties.

It is so **ORDERED**.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Entered May 18, 2001

SHARIN C. BROWN,

Plaintiff-Appellant,

v.

No. 99-2513

FORD MOTOR COMPANY,
a Delaware corporation,

Defendant-Appellee.

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc as submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS SO ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

\s\

Patricia S. Connor
CLERK

* * *

our laws she's not able to recover for negligent design. And to the extent that there is a warranty claim, if you believe this was a misuse, she will not be able to recover. And if you believe that Mrs. Brown's negligence was the sole proximate cause of this accident, and I think the evidence will show that, then, of course, under all those circumstances you would find your verdict for Ford.

We have talked about the fact that the evidence is going to show that plaintiff's claim that this vehicle was too high and too narrow, that it had a twin I-beam suspension that jacks and throws the vehicle over, you simply are not going to see any test that they can show you that shows that the Ranger 2x4 jacks. You are simply not going to see evidence of that.

What you are going to see is an expert come in and say, Gee, this looks too high to me. I think it jacks based on all I know. I can look at it and see that it jacks. That's what he's going to say. We talked about the static stability index. Static stability sitting on the ground. That index for this vehicle 1.13 falls right in the middle of the track for light, middle pickup trucks. Besides that, the National Highway Safety Administration has found that T/2H which is the fraction that is used for the fraction stability index is not a proper measure for determining how often a vehicle will roll. It has rejected that measure.

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playing. And now sensing they may be able to keep out seat belts, they are taking a second bite at the apple and it's an apple they agreed to.

MR. CROMWELL: And the problem with that, Judge, is they got into a bunch of evidence about fatal rollovers.

THE COURT: I'm not going to have more than one attorney speaking to more than one issue -- speaking to the same issue I mean.

MR. STEWART: Mr. Cromwell is correct. That's why we had to counter-designate to put into context the designated testimony by plaintiffs. They've talked about a bunch of fatal rollover statistics. This is not a fatal case. What those show is that while pickup trucks and utility vehicles may be involved in fatal accidents more often that passenger cars, for belted occupants the rate of injury and death is greatly reduced. And those statistics on the reduction of injury through seat belt use come out of the same statistics that --

THE COURT: Well, I think this is all moot because I have looked at this seat belt business every possible way, and I see no basis upon which to exclude the seat belt testimony, either from the fact that the plaintiff wasn't wearing one or the fact that the passenger was. It appears to me that the law is clear that it's not evidence of negligence not to wear a seat belt. It can't be considered in mitigation of damages.

I don't know, the most difficult question is can it be considered in causation as opposed to mitigation of damages? I think when it says it's not evidence of negligence, that's a substantive rule. When it says that language about mitigation, that seems to be about somewhere in the middle. And beyond that they are talking about evidentiary issues which are controlled by federal

law, and implicit in that is the fact that I think the statute has to be strictly construed.

It seems to me all the courts that have looked at the statute have strictly construed it. And with good cause, because it's contrary to the public policy of Virginia which is that a violation of the statute is evidence of negligence. And here, obviously, it's the policy of the State of Virginia that the people use seat belts and yet we've got this statute ruling the other way. It's not only contrary to public policy of Virginia, but it's contrary to -- it's a derogation of the common law and it's contrary to common sense.

So the Court's going to interpret it in that manner, and that means that the evidence that the use or lack of use of seat belts will be admitted.

Now, does counsel want me to give that warning to the jury about disregarding the statement about the charges? I quite frankly forgot about it when we came back after

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* * *

Because one thing we know for sure is that it's a substantive rule of law that the plaintiff can't be found guilty of contributory negligence based on the fact that she was not wearing a seat belt. Beyond that, it's not as clear.

It appears to the Court that, again, the defendant can't argue that she failed to mitigate her damages by not wearing the seat belt. On the other hand, it appears to the Court, and I'm not sure about these issues and I don't think we need face them until instruction, but I do think the defendants can argue that had she been wearing a seat belt that these injuries would not have occurred. In other words, the proximate cause.

MR. McGETRICK: Our position --

THE COURT: That's a hard line to draw.

MR. McGETRICK: Our position would be that is mitigation of damages.

THE COURT: Well, I can see why you would say that, but we have to draw the line somewhere.

MR. McGETRICK: Right.

THE COURT: The proximate cause of the damages and the mitigation of damages are two different issues. In the Court's mind, what proximately caused them is one issue and the failure to mitigate them is another. And because we're talking about the design of a vehicle, I believe that not wearing the seat belt is an element for the jury to consider

* * *

* * *

in what proximately caused the damage and also in whether the design of the vehicle was either negligent or defective.

Now, the fact that it can't be contributory negligence doesn't mean that the existence of the seat belt can't be evidence of reasonable care on the part of the defendant.

MR. McGETRICK: The only final point I want to add --

THE COURT: I guess arguably these cases used various theories to get around these seat belt statutes. But one of them -- you could argue even that the failure to use the seat belt is misuse of this product, but, of course, you can't say that it's contributorily negligent.

MR. McGETRICK: I would make final point with the Court with respect to the fact that the defendant is claiming that this action arises out of the design of the vehicle. And our point is that it arises out of, and these are the words of the statute, the operation of the vehicle. That is such, Judge, because if you have a badly designed vehicle and it's just sitting in your yard, you have no cause of action. It's only when you turn the key and you start driving it and operating it that the action arises.

THE COURT: Well, that's another problem, and I don't necessarily disagree with you on that. As I say, the cases discuss several aspects of why the statute doesn't

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* * *

prohibit this seat belt testimony. One of them is the defendant here is a manufacturer, and the statute doesn't use the term "manufacturer." But the manufacturer of a vehicle can't be the proximate cause until somebody uses it.

MR. McGETRICK: Exactly.

THE COURT: So that's a problem with that theory.

MR. McGETRICK: The wording does use the words "arises out of." I don't think that necessarily means that cause of action arises out of it. I think the cause of action may be based in design, but the action arises out of the operation of the vehicle.

THE COURT: Well, arguably it does. I'm not passing on that at this point.

MR. McGETRICK: All right, sir. We would note our objections to the Court's ruling for the admissibility of the nonuse of seat belts.

THE COURT: All right. Well, the Court's ruling -- we've looked at about all the cases we can find. And what the Court is attempting to do, as I say, is to construe the statute strictly, because the Court believes the statute is in derogation of the common law. And it's also contrary to the public policy of Virginia since violation of other statutes relating to the operation of vehicles is negligence per se. It's certainly a radical departure to say that a violation of this statute is not negligence at all, but it says that.

* * *

* * *

but it was something she wanted to do.

Q. Would you say she's a little bit headstrong?

A. Yes, sir, I would.

Q. Did the Ranger come equipped with seat belts?

A. Yes, sir, it did.

Q. And have you had the occasion to be in the vehicle with your wife, either as a passenger or her as the driver, on numerous occasions?

A. Yes, sir. She buckled up religiously. She got in, shut the door, and she buckled her seat belt.

Q. Can you think of a time where she did not wear a seat belt?

A. No, sir.

Q. How is Sharin now, from your observations? And IF you could talk in terms of what you could observe as to what she could do or what she couldn't do.

A. She's physically disabled. She can't stand a long time. She can't sit a long time. She can't move anything heavy or like slide the couch out to clean behind it, and general things like that, because of her back injuries. Some days she has good days and some days she has bad days where she doesn't even want to get out of bad, it hurts so bad.

Q. Does she take medication for her pain?

A. Yes, sir, just about every day, sir.

Q. Are you familiar with the intersection where this

* * *

* * *

Ranger pickup truck for you?

A. Yes, he did.

Q. And when was that?

A. November of '93.

Q. Okay. Whose idea was that? Was that your idea, his idea or --

A. I told him I would like to have a small truck.

Q. And why did you choose the small truck as opposed to --

A. I like going garage-saling [sic] antiquing, and stuff like that; and I thought it would be great to be able to pick up stuff in it.

Q. And whose decision was it to get a Ford Ranger?

A. It was David's.

Q. When was that purchased, ma'am?

A. November of '93.

Q. November of '93?

A. Yes.

Q. And what was the date of your accident?

A. August 12th, 1996.

Q. Do you remember what day of the week it was?

A. It was Monday.

Q. All right. Tell us a little bit about the day of the accident.

A. It started out with I had to take my son for a doctor's appointment. And after the doctor's appointment, we had had plans to go school shopping.

Q. Where was the doctor's appointment?

A. It was in Suffolk, Virginia.

Q. So you drove from your home in North Carolina to Suffolk, Virginia?

A. Yes.

Q. And how long a trip was that?

A. It was approximately 25 miles.

Q. Okay. And how old was your son at that time?

A. Sixteen.

Q. All right. You may continue.

A. Okay. And from there, we went to Franklin, which is a place I'd never been before; but my son had been there before. He suggested going there because they had a Belk out there. He liked shopping there. So we went to the Belk in Franklin. We'd driven straight down 58, and in that same shopping center there was a Food Lion, Burger King, Revco, which is all the places I needed to go that day.

First, we went to Belk, went to Burger King and had lunch, went to Revco, turned in his prescription and dropped it off. Then we went to Food Lion, and I did my grocery shopping for the week and then back to Revco to get the prescription.

Q. Did you drive the truck all the time as opposed to your son?

A. I think after we went to Burger King, we parked over between the Revco and the Food Lion, and then we just went to both stores without getting back into the truck. It was all in the same shopping center.

Q. But my question was, were you the only driver that day?

A. Oh, yes. My son didn't have his license at the time.

Q. All right. Did you use the vehicle very much prior to the accident? Did you use it every day?

A. Pretty much every day. Almost.

Q. Do you know how many miles were on the vehicle on the date of the accident?

A. I think it was 90-some thousand.

Q. I think your husband testified yesterday that it was 90,000 when you got it?

A. Oh, I'm sorry. I thought that's what you were asking me.

Q. No. I meant the day of the accident. How many miles did you put on it, if you can recall?

A. I don't know for sure.

Q. Okay. All right. What was the weather that day?

A. I think it had sprinkled that day, but I'm not real certain.

Q. Okay. And after you completed your shopping chores and what have you, what did you do next?

A. Well, we started to go home, but rather than go home the way we had come there, because it would have been a big circle, we would have been going out of our way, my son thought he knew a quick way to get back through; but he couldn't remember where to turn, and I saw this street that I recognized. I didn't -- wasn't real familiar with it, but I knew of it because a friend of ours used to live on it. It was called Longstreet, so I took that because I knew it would take me home.

Q. Had you ever been on Longstreet before?

A. Not that far down.

Q. How about further down?

A. Well, that's where it started at on 58. I'd never been down that far.

Q. What about other portions of Longstreet, had you ever been on that before?

A. Just a couple of miles because my friend lived on Longstreet, but Longstreet is a very, very long road.

Q. All right. So you're on Longstreet headed home. Tell us what happened then.

A. Well --

Q. Let me backtrack -- excuse me for a moment. How much groceries did you buy, and where did you put them in the vehicle?

A. I don't remember exactly where I put my groceries at, but I bought a full week's worth, which is probably about $80 worth, so probably about anywhere from six to ten bags.

Q. I assume they were put in the bed of the truck as opposed to the cab of the truck. Do you remember the location in the bed where the groceries were?

A. No. I can't remember.

Q. Were they paper bags?

A. Yes, they were paper bags?

Q. And Chris helped you with that?

A. Yes.

Q. Was there dog food in those bags?

A. Yes, there was.

Q. Do you have animals?

A. I have three dogs. At that time I think I had four.

Q. Do you have any other animals at home?

A. We have chickens.

Q. All right. Describe what happened as you were approaching the intersection where the accident happened.

A. Well, I seen the intersection as I was coming to it, and I knew that the road beared [sic] off to the left, so I lightly applied my break, and I turned the wheel to the left. I felt myself start to slide on the gravel, and after that, I really don't remember anything. Everything just happened so fast.

Q. Do you remember rolling?

A. I remember feeling the sensation of rolling for a brief second. I don't know when exactly it was.

Q. Were you on the travel portion of the road when you hit gravel?

A. Yes.

Q. Okay. What do you remember after that?

A. I remember coming to in the ditch. I was laying in the ditch in water.

Q. What did you do?

A. Well, the first thing I did was, I seen everybody standing around me, and I asked where my son was, and my son was all right.

Q. Okay.

A. And I remember one woman standing there and telling me, "Honey, don't worry about your son. He's fine." I didn't believe it.

Q. Okay. And did you -- did someone come to help you then?

A. There was a lot of people around. I don't remember speaking to anybody but that one lady. She was very nice to me.

Q. All right. What is the next thing that you do remember?

A. I remember when I first got into the helicopter, I kept asking where Chris was, and they said he was on the helicopter with me, though I couldn't see him, so I didn't believe anybody that would tell me that because I figured because I was hurting so bad, that he had to be hurt real bad, too.

Q. Okay. What happened next?

A. I assume that we flew to the hospital, but I don't remember it. My next memory is, I guess, being in the CT and them telling me to just bear with them. There was something wrong with the machine, but they were trying to get it corrected. And then I don't remember anything again until, I guess, right before my surgery, and my husband was standing beside me.

THE COURT: I'm having trouble hearing you.

THE WITNESS: I'm sorry.

MR. McGETRICK: If you would speak a little closer to the microphone.

THE WITNESS: Okay. Right before my surgery, I believe my husband was standing there trying to comfort me.

BY MR. McGETRICK:

Q. I'm sorry.

A. My mother-in-law was standing across the hall looking at me very strangely like she couldn't recognize me.

Q. Okay. Did you have any idea how you looked?

A. I had no idea. I didn't see a mirror for days while I was in the hospital.

Q. Had anyone cleaned you up at that point?

A. Not that I'm aware of.

Q. Were you feeling pain at that time?

A. I don't remember.

Q. Had they prescribed painkillers, or had they administered painkillers to you?

A. I don't know. That day is so fuzzy, it's hard for me to remember anything but what I've just told you.

Q. All right. And did you then stay in that hospital?

A. Yes. I was there for 15 days.

Q. Okay. And tell us a little bit about your hospital stay and treatment that was administered to you while you were there?

A. I was in intensive care for 10 days because of my chest tube. They had to keep the chest tube in for 11 days because my chest would not stop draining. They finally moved me to another room after the 10th day, and that's when they took the chest tube out, when I was in the second room.

After that, the chest tube was taken out. Then they could get me up out of bed to use the bathroom and stuff. Before that, I was never even able to get out of the bed, and then they put the back brace on me finally.

Q. Back brace?

A. Yes.

Q. Did you bring that with you today?

A. Yes, I did. It was made especially for me.

MR. McGETRICK: May I approach the witness, Your Honor?

THE COURT: Mr. King will do it for you, Counsel.

BY MR. McGETRICK:

Q. Can you tell the jury what that is, please?

A. It's a back brace. It was to keep my back stable.

Q. And how long did you wear it?

A. I think it was about three and a half months.

Q. And when did you first start to wear it?

A. While I was in the hospital.

Q. All right. Did you wear it day and night, or were there times that you could take it off?

A. Any time that I wasn't laying down, I had to have it on.

Q. All right. Thank you. Now, during your stay at the hospital, you were operated on; is that correct?

A. Yes, I was.

Q. Do you remember what day that was?

A. It was the night I was admitted.

Q. The night you were admitted?

A. Yes.

Q. Okay. Did you have any other kind of treatment while you were there, such as physical therapy?

A. The day before they released me from the hospital, he took me down to the physical therapy room and showed me a couple of exercises I could do at home.

Q. If you could speak just a little louder and into the microphone, I think the jury would be able to hear you. There you go.

A. Okay.

Q. Did your husband come and see you at the hospital?

A. He spent almost every night there beside me. He slept in a reclining chair that was there, and then the nurse brought in a cot for him.

Q. How would you describe your relationship with your husband?

A. We're very committed to each other, and we love each other very much. We've been together for a long time.

Q. And then did there come a time that you left the hospital?

A. Yes.

Q. And how -- tell us a little bit about that, how you managed to get to the car and so forth.

A. Well, they originally wanted to send me to a different hospital for rehabilitation, but I was very anxious to get home and be with my family. So the day I was released, they wheeled me out to the front entrance, and then David picked me up and put me in the truck to bring me home. And then he had to pick me up and carry me in the house when we got home.

Q. And you took the wheelchair with you; is that correct?

A. Yes. They gave me the wheelchair to bring home.

Q. How long were you confined to a wheelchair?

A. I had my wheelchair and my walker up until Halloween, so it was a little over two months.

Q. Okay. And then after the walker, I mean, did you have to use a walker after you got rid of the wheelchair?

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picture that's been previously marked as Plaintiff's Exhibit Number 263-A. I believe it's already been admitted into evidence. I need my computer man here.

Now, Mrs. Brown, do you have on your screen a picture of the accident scene?

A. Yes.

Q. Do you recognize the person standing there on the right-hand side of that picture?

A. Yes.

Q. Now, is that your son, Christopher?

A. Yes, it is.

Q. And we were told yesterday -- well, did Christopher come to see you in the hospital?

A. Yes.

Q. And was he there the day after the accident?

A. I didn't see him until the day after the accident when he was released from the hospital.

Q. Right. And he was walking around and had a bandage on his arm; is that right?

A. Yes.

Q. Incidentally, Mrs. Brown, was Christopher wearing his seat belt in the accident?

A. Yes, he was.

Q. And he wasn't ejected from the vehicle, was he?

A. That's correct.

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aggressively into the windshield or possibly thrown out of the vehicle; isn't that right?

A. That's correct.

Q. Now, Mrs. Brown, did you have a seat belt on at the time of this accident?

A. I can't say positively because I don't have any recollection of actually putting it on that day, but in my heart, I feel certain that I put it on because I made it a habit. My grandmother died in early '94 from being thrown through her windshield.

Q. Mrs. Brown, you don't remember whether or not you had your seat belt on at the time of that accident; isn't that correct?

A. That's correct. I can't say positively.

Q. I'm sorry?

A. I can't say positively. I feel certain that I did have it on though.

Q. In fact, you told Officer Kline that you didn't know whether you had it on?

A. I don't remember speaking to Officer Kline at all.

Q. If Officer Kline were to say that you told him that you didn't know whether you had it on or not, you wouldn't quarrel with that, would you?

A. I don't remember speaking to him at all.

Q. Now, would you say that it was probably -- basically, you had not always been -- always worn your belt, had you?

A. That's correct.

Q. And from time to time, even after 1993, isn't it true that you would get in the vehicle and realize that you had not put your belt on?

A. No. That's not correct. I started wearing my seat belt after my grandmother died.

Q. I see. And is it your testimony that after that date, you've never got in a vehicle without putting your seat belt on?

A. No, I can't say that for a fact because I might have gone up to the store and forgot to put it on.

Q. And that's one of those things that can happen to you from time to time, right?

A. Right.

Q. Now, did you tell any of the doctors in the emergency room that you were not wearing your seat belt?

A. I don't remember speaking to anybody in the emergency room.

Q. All right. How about Dr. Butler there at Sentara Norfolk General Hospital, did you tell him that you weren't wearing your seat belt?

A. I don't know who he is?

Q. Do you know who Dr. Weireter is?

A. I vaguely remember him because he was the doctor that released me from the hospital, I believe.

Q. Did you tell him that you weren't wearing your seat belt?

A. Not that I remember. I don't remember speaking to anybody in the emergency room.

Q. I see. So during the time you got all that health care, you don't remember any health care provider asking you --

A. Not that first day. I believe I was in shock that first day.

Q. All right. After the first day, you discussed this accident with --

A. I talked to nurses, yeah.

Q. And you have a firm recollection that Chris was, in fact, wearing his seat belt?

A. Yes.

Q. And you know that he was not ejected from the vehicle?

A. That's correct.

Q. What sort of injuries did Chris sustain in this accident?

A. He had 30 stitches on his arm, and he had a concussion.

Q. Right. And he was up and around out of the hospital on the day after the accident; is that right?

A. Yes.

Q. You had an opportunity to look at the vehicle after the accident; is that right?

A. Yes.

Q. I want to show you now, Mrs. Brown, what has previously been marked as Exhibit 263-C, Plaintiff's Exhibit 263-C, and I'll ask you if that's a picture of Chris a couple of days after the accident?

A. I believe so.

Q. And is that the condition he was in when you saw him the day after the accident?

A. Yes.

MR. McGETRICK: Judge, I'm getting a little confused. We don't have any exhibits that number. All our photographs are 123.

MR. PAGE: I'm sorry. That is Defendant's Exhibit 263-C.

MR. McGETRICK: Defendant's exhibit?

MR. PAGE: Yes. And I would move Defendant's Exhibit 263-C into evidence, Your Honor.

THE COURT: All right. Defedant's 263-C; is that it? All right. That will be admitted.

MR. PAGE: For the record, that's a picture of Chris Brown standing in the intersection.

BY MR. PAGE:

Q. Now, Mrs. Brown, you did not have an opportunity at the scene of the accident to see any of the marks that were left by your vehicle, did you?

A. The only marks I saw was when Mr. Richardson had gone out there to investigate.

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A. Yes, it is.

Q. You mentioned a gouge in the road right before her vehicle started rolling. How long was that gouge in the road?

A. Approximately, four feet long.

Q. How deep was it?

A. Approximately, a half inch.

Q. Do you know what kind of speed and forces are required to dig a gouge four feet long and half inch deep in an asphalt road?

A. You would have to be going pretty good and also to travel the distance she did when she rolled, and calculate it from distance. There are formulas to use to come up with the speed.

Q. How long did she roll before coming to a rest?

A. 50 yards, maybe 60. Approximately, 50 yards.

Q. Was Chris Brown still in the truck when it came to a rest?

A. It was reported he was. But when I arrived, he was with the rescue squad.

Q. Was it also reported Chris Brown was wearing seat belt?

A. He advised he was.

MR. McGETRICK: Objection, Your Honor.

BY MR. CROMWELL:

Q. Did you ask Chris Brown if he was wearing his seat belt?

THE COURT: What's that?

MR. McGETRICK: He asked the officer whether it was reported whether Chris Brown was wearing a seat belt.

THE COURT: That, of course, would be hearsay. Disregard that evidence, ladies and gentlemen.

BY MR. CROMWELL:

Q. Do you know if Chris Brown was wearing his seat belt?

A. I asked him if he was, and he stated yes.

MR. McGETRICK: Objection, Your Honor.

MR. CROMWELL: I'll withdraw the question

BY MR. CROMWELL:

Q. Was Sharin Brown still in the truck when it came to a rest?

A. Not to my knowledge. You could see where someone had been thrown from the vehicle. There was an impression in the grass south of the car.

Q. Was Sharin Brown wearing her seat belt at the time of the accident?

A. When I spoke to her at the scene, she could not remember wearing the seat belt. I checked the seat belt itself. It was in the upward position. It wasn't pulled down. I pulled the latch down to the point where it would click into the latch, and it was very little space between it, and it didn't appear anybody could fit in it.

I looked at the metal latch itself and did not see any type of deep scratches, indentations, anything that would indicate to me from what I have been taught that it had popped free due to a force. I put it into the seat belt and checked it to see if it would work. It clicked in, and I pulled on it as hard as I could and it did not pop free.

Q. At the beginning of your answer, you said - you did something with the seat belt to see if it would fit across?

A. The seat belt, the latch was up. And what I did was to pull it down to check and see -- a lot of times when I have checked seat belts in the past, once you release them they won't go all the way, and if you pull them back there is a gap. This time there was no gap.

Q. So you took the seat belt where the latch was located and tried to take it across the seat or where the plate was located you tried to take it across the seat t where it could be latched in?

A. Yes, I did. I held the seat belt and the buckle itself so it wouldn't slide, so it wouldn't move, and kept it in the same position and kept it down.

Q. When you did that, was there enough room to go across the seat and still have somebody in the driver's seat.

A. It did not appear to be.

Q. Was that one of the things that helped you in arriving at the conclusion that she was not wearing her seat belt?

A. That and looking at the metal on the latch itself.

Q. After you concluded – how long did you remain at the

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her action as exceeding the safe speed?

A. If you would have stayed in the lane of travel, I think 55, you might have been able to make that lane. But in the case where she went into the gravel, which was out of the lane of travel, it appears she was going a little too fast for that condition because of that. I did it to give her the benefit of the doubt and I put it up there.

Q. At the bottom of the accident report under -- let me double-check what heading it is under. Number 11, the top line, is for Sharin Brown and the bottom line is for Christopher Brown; is that correct?

A. Yes, it is.

Q. What does Category Number 11 stand for?

A. Safety equipment used.

Q. And you put a number one in the box for Sharin Brown; is that correct?

A. Yes, I did.

Q. What does that number one stand for?

A. No restraint used.

Q. And you a Number 4 for Christopher Brown; is that correct?

A. Yes, I did.

Q. And what does that stands for?

A. Lap belt and harness.

Q. I would like to draw your attention to Question Number

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have occurred in a rollover event.

This is not a circumstance where the car ran into the bridge abutment, and basically, the plaintiff was thrown forward in a way that would cause that kind of axial loading. So it seems to me, Your Honor, that his expertise allows him relying on what Dr. Churchill said at his deposition and his background in this area to testify with respect to those matters.

THE COURT: Well, I don't think so. Number 1, I think that would run contrary to the statute. This statute causes a lot of problems for reasons that we've stated before. The statute says explicitly that failure to wear a seat belt is not evidence to be considered in mitigation of an injured party's claim. I'm not sure exactly what the word is. It's not to be considered in mitigation.

Now, what I'm wrestling with, and I don't think there's any clear resolution to this, whether, notwithstanding the fact that it can't be considered in mitigation, whether it could be considered on the issue of proximate cause.

MR. PAGE: Yes, sir. And his testimony goes directly to causation and really has nothing to do with mitigation.

THE COURT: Well, I don't think it's so easy to separate the two. I mean, to my mind, the outer limits that Dr. Piziali should be able to testify to, considering his expertise and considering the limitations of the statute, would be that based

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that she had tell you whether or not there was another passenger in the car?

A. I understand her son, Christopher, was in the passenger seat.

Q. And I will ask you to assume that the evidence in the case is that Christopher Brown was, in fact, belted at the time of the accident?

A. I understand that from the police report, yes.

Q. All right, sir. And I will now ask you whether you inspected the passenger-side restraints that Christopher Brown would have been wearing if, in fact, he was sitting in that seat?

A. I did.

Q. And what did your examination of that belt tell you?

A. Well, there are some scratches on the surface where the belt would interact with the plastic, and they're not real deep, and you wouldn't expect them to be particularly deep in a rollover accident; but they appear to be more than what I would normally see just from abrasion from use. And they're quite different from the other side, which I think really the abrasiveness would probably be similar on both sides, so it's my best estimate that those marks are, in fact -- were made at the time of the accident by the forces that Christopher Brown put on his belt during the rollover.

Q. Now, Doctor, would you tell the ladies and gentleman of

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THE WITNESS: It is the right, Your Honor. I'm sorry. Yeah, it's the left ribs, but it's the right hip.

BY MR. PAGE:

Q. All right. Now, Dr. Piziali, in your inspection, based on your inspection of the vehicle, did you arrive at a conclusion as to whether or not there was on the belt of Chris Brown evidence of the facts that he was restrained in the vehicle?

A. Yes. I think that the markings on the latch plate are most likely associated with him loading the belt during this accident.

Q. All right, sir. I'm going to place on the Elmo, and if it doesn't work here, we'll try to get on the screen what's been marked as 140-71, Defendant's 140-71, and ask you if that is a latch plate that you believe, first of all, was Christopher Brown's latch plate and whether you can show the markings there that you are making reference to?

A. Yes. That's Christopher Brown's. That's the right side latch plate. And if you look kind of what I would call at the right-hand edge of the slot, which is where your black arrow is. It's down and to the left.

Q. Hold on a minute, and let me see if I can get this arrow going here. Now, I've got him.

A. There you go. Right in there. Exactly.

Q. In this area right here?

A. Yeah. You see those scratch marks? Okay. Those scratch marks are, I think, more than I would see from just normal usage, so I believe that those scratch marks are caused by Christopher Brown.

Q. When you say "caused by Christopher Brown," what is there about Christopher Brown moving around in this accident belted that caused him those scratch marks?

A. If you can just forget about Chris Brown for a minute, and you can imagine if somebody held that tongue, that latch plate, and you had both edges of the belt, and if you pull real hard on both sides of the belt, and then you sort of let one slide over the other, that pressure on the stitching -- the stitching unfortunately looks fairly whited out, but you can kind of see that it's sort of bumpy, okay, the fabric that makes up that belt. And those ridges will start making scratch marks on the plastic due to pressure from the belt and sliding of the belt.

Q. And, Doctor, did you see any similar scratch marks on the latch plate of the belt that was at the driver's side or the seating position where Sharin Brown would have been seated?

A. No, sir.

Q. And did you inspect the vehicle for that latch plate for that purpose?

A. Yes, sir.

Q. All right, sir. Now, Doctor, in your inspection of the

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Q. Now, Doctor, based on the work that you've done, your inspection of the vehicle, your review of the materials, the police report, the police officer's deposition, and the other information that you told the jury that you have read, you have arrived at an opinion or any opinions in this case?

A. Yes.

Q. First of all, have you arrived at an opinion as to where Mrs. Brown exited the vehicle?

A. Not precisely because we did not have her point of rest, but my belief --

Q. Let me rephrase the question. I'm not asking where along the roll.

A. Oh, oh, oh, I'm sorry.

Q. I'm asking whether you arrived at an opinion of what was the portal or place that she actually went out of the vehicle?

A. Yes. I believe she went out the driver's door window.

Q. All right, sir. And have you arrived at an opinion as to whether Chris Brown was ejected?

A. Yes. From the police report, I have; and I believe he was not ejected.

Q. And do you believe that he was or was not wearing his seat belt?

A. I believe he was wearing his seat belt.

Q. And what is the physical information that you base that opinion on?

A. On the marks on the latch plate plastic of the seat belt.

Q. Now, Doctor, have you arrived at an opinion as to whether you believe Mrs. Sharin Brown was seat-belted at the time of the rollover?

A. Yes.

Q. And what is that opinion?

A. I do not believe that she was.

Q. And why do you believe – would you give the ladies and gentleman of the jury the basis for that opinion?

A. Yes, because there's no physical evidence that the belt was being worn. It's clear that she was ejected because it wasn't being worn. I believe that the officer indicated that after the accident, he inspected the latch plate and determined that it's not consistent with having been worn.

Q. And when you say -- you read the officer's deposition on that point; is that correct?

A. Yes, sir.

Q. I will ask you to assume that his testimony before the jury yesterday was substantially the same as his testimony in his deposition?

A. Okay.

Q. And --

MR. McGETRICK: Your Honor, that's not entirely correct.

THE COURT: Well, I don't think that you can ask him to make that assumption.

MR. PAGE: All right, sir.

BY MR. PAGE

Q. Doctor, based on the description of what the officer did inspect at the accident scene, would you tell the ladies and gentleman of the jury what you understand that to show?

A. Yeah. I mean, I think he said he looked at the belt. He buckled it and pulled on it and did other things and showed that the belt was functioning properly and that given the position of the latch plate on the belt, that it was not in use at the time of this accident.

Q. Now, Doctor, have you arrived at an opinion that whether or not the injuries, the hip and back injuries particularly, of Sharin Brown are consistent with her having been ejected from the vehicle?

MR. McGETRICK: Objection, Your Honor.

THE COURT: Sustained.

BY MR. PAGE:

Q. Doctor, based on your examination of the medical records and your examination of the testimony of the deposition of Dr. Churchill, have you arrived at an opinion as to whether or not the injuries to Sharin Brown were consistent with an axial loading through her -- up through her hip and into her back?

A. Yeah. The axial loading is consistent with both the hip injury and the spine injury.

Q. And what is an axial load, Doctor?

A. An axial load means basically what we talked about that that's the load that you might look at as it acts along the long axis of something. Okay? And so, for example, with your femur, because it goes from your knee to your hip, that's the long axis. And an axial load is the long, long axis of the bones.

That's basically compressing the two ends of the femur together, which could be caused by, as Dr. Churchill mentioned, if you jump from a height, your feet stop, your tibias stop; your femurs stop; and then your torso still has to stop; and basically the forces to stop your torso has to go through your femur. And so those forces can become quite large, and that produces a large axial load consistent with the type of fracture she has.

The spine is the same way. If you come down hard on the ground, again, the pelvis is stopping, and it's loading the femur; but the pelvis is being loaded by the upper torso. And most of that load goes down your spine, so the lower part of your spine is really stopping all of this upper body mass that's trying to move, and so it breaks.

Q. And, Doctor, when you say "an axial load", when we're talking about the hip fracture -- maybe I'm using the wrong hip here -- but you're talking about a load that proceeds up at least from the knee into the direction of the hip, right?

A. Basically, you've got to have forces at both ends trying to push it together.

Q. All right. And the same thing would be true, those same forces would push up into the back; and if there was some flexion forward, bending forward, that would be likely to cause the burst fracture?

A. Yes, sir.

Q. And, Doctor, in a rollover accident, as you've described it where the vehicle is rolling over and the occupants are moving up and out, would you expect to see inside the vehicle that kind of axial loading?

A. For the hip, definitely not. And you can get some on the spine, but it's a way too low magnitude to produce injury.

Q. All right, sir. And could you tell the ladies and gentlemen of the jury, whether you believe that the axial loading that occurred to Mrs. Brown as evidenced by the injuries to her hip and the injuries to her spine are consistent with her having been basically deposited in a way that her lower leg or her leg struck the ground and ---

MR. McGETRICK: Objection, Your Honor.

THE COURT: Sustained.

BY MR. PAGE

Q. Doctor, can you tell me whether, in your opinion, the axial loading that occurred to Mrs. Brown is consistent with, in your view, and injury that occurred as she was dropped onto some or deposited onto some hard surface?

MR. McGETRICK: Objection, Your Honor.
THE COURT: Sustained.
MR. McGETRICK: May we approach, Your Honor?

(Sidebar conference as follows:)

MR. McGETRICK: Your Honor --
THE COURT: You've taken this as far as it can be taken.
MR. PAGE: All right, sir. I would just say for the record, Your Honor, that it seems to me that once you established the fact -- and I thought I was moving within Your Honor's parameters. Once you establish the fact that there was an axial load, and that the axial load would not be likely to be seen inside the vehicle, that you would be able to ask him whether it is consistent with a load that would occur when a human form was deposited on a hard surface.
THE COURT: I think that's where you run afoul of the statute. I think in the absence of the statute, that that logic would follow; but I think that's where the statute cuts you off.
MR. PAGE: All right, sir. Thank you, sir. We'll note our exception.

(Sidebar conference concluded.)

BY MR. PAGE:

Q. Doctor, have you had occasion to -- well, let me do this another way.
If I can have one second, Your Honor.
Doctor, have you had occasion to --
MR. McGETRICK: May I see the exhibit, please?
MR. PAGE: Certainly.
MR. McGETRICK: May we approach, please?
THE COURT: About time to stand up.

(Sidebar conference as follows:)

MR. McGETRICK: Judge, as I see it, it talks about injuries inside and outside the vehicle, and the court has ruled that this expert cannot comment whether the injury occurred inside or outside the vehicle; and this is kind of a back doorway to do that, in my opinion.

I think he can talk about the forces that come into play to cause the type of physical injury, but he cannot comment either directly or indirectly where those forces came from, either inside or outside the vehicle.

THE COURT: I wondered why you didn't object when he said they weren't present inside the vehicle, but that part did come in without objection, but --

MR. McGETRICK: Yeah.

THE COURT: No, not to me. This runs directly afoul of the statute. It says "rollover injury severity." It's as close as you can get to mitigation of the injury.

MR. PAGE: Now, Your Honor, what this chart that's been identified tends to show is the AIS-4 injuries, which is what this injury was, they are more likely to occur if a person had been ejected than if they're not ejected.

THE COURT: That's not the problem, Counsel. The problem is the statute --

MR. PAGE: I understand that, Your Honor, but I guess my point is simply that the statute basically does not prevent a -- on Your Honor's ruling, testimony with respect to the actual case of an injury.

THE COURT: Well, that would be the most generous view that I could give. Here this talks about the severity of injury. That's what it says. And I think that that's even --

MR. PAGE: No --

THE COURT: -- closer this instant (phonetic) litigation than it does causation, even if I accept the proposition that causation can be related to the seat belt, but certainly severity can't.

MR. PAGE: No. The only thing that that has to do with severity is that Mrs. Brown's injury is rated as a basically AIS-4 injury. And that's the only thing that has to do with severity, and all that thing says is that an AIS -- all those statistics show is that an AIS-4 type injury with a fracture with a pneumothorax and back fracture is substantially more likely to occur when ejected than when they're not.

THE COURT: In other words, the injury is worse --

MR. PAGE: No, sir.

THE COURT: --when ejected?

MR. PAGE: No, sir. If you took all of the AIS forces, it's the statistics. There are -- it is more likely to occur if you're ejected. That's what that shows.

THE COURT: Well, that isn't what this says. I'm not going to let that in. It says severity. It doesn't say --

MR. PAGE: Your Honor, but let me ask this question. The doctor will testify that this is an AIS-4 injury and that the statistics show that of all AIS-4 injuries that occur, 60 percent occur outside of the vehicle; and less than 10 percent occur inside the vehicle. Okay?

Basically he will testify that you're 50 percent more likely to get an AIS-4 injury if you are objected than if you're not.

THE COURT: That's just letting him testify to what the chart says.

MR. PAGE: But it says nothing about rollover injury severity. She got what she got. She had an AIS-4. We're not saying that we're likely to make her injury worse because we specifically, based on Your Honor's ruling, stayed away from, and we agree with it, the concept of fatal injuries or fatal rollover. This is describing the injury that Mrs. Brown actually received in saying that she was --

THE COURT: I think -- no. I think that that's trespassing too far on the statute. And I don't think there's any secret that I think that this statute causes problems; but there it is. And this court's bound by it, and I just think that the statute prohibits that kind of evidence.

MR. McGETRICK: Judge, lastly, I would just encourage Rosy to live up to his promise to approach the bench when he asks these questions. You mentioned that I did not make an objection. I don't want to be popping up every three seconds objecting and give the appearance to the jury that I'm trying to keep them --

THE COURT: I told the jury not to hold that against you. I cut him off one time--

MR. McGETRICK: Yes, sir, I realize that.

THE COURT: It's not my responsibility. I just did it because I thought it was pointing to a previous ruling that --

MR. PAGE: I will endeavor, Your Honor, to move on. I think I'm just about through with this witness. If I understand it, the rule is that he cannot testify as to the cause of this lady's injury or the ejection, however, I'd like to ask him if, in his opinion, had she been belted, she would have been less likely to receive this injury. I want to proffer that one for the record.

MR. McGETRICK: Your Honor, I don't think that's -- that's an indication of damages and goes against the statute also. The nonuse of seat belts should not be used for mitigation of damages. It just comes in front of belting. There is a nonbelted point of view.

THE COURT: Yeah, I think you can. And -- but I just don't believe that in the face of the statute that the court can permit that question. I think it's permissible, but what the statute says is: Not wearing the seat belt and not -- is not evidence of a lack of mitigation. And if it's not evidence, then I don't think -- in other words, courts who have tried to construe the statute have come up with various theories, like he says it doesn't apply in products cases. It doesn't apply here now.

And I think the fairest analysis one can get of the statute is that it's simply an unusual statute that's contrary to the common -- contrary to the Virginia rules, the effect of statutory violation. So, therefore, it must be strictly construed.

So what the court is doing is strictly construing it. The court is not ruling that it doesn't apply. So, I think you can infer and present evidence upon which the jury can infer that her ejection was a proximate cause, but I don't think you can now --

THE COURT REPORTER: Excuse me. I can't hear you.

MR. PAGE: I understand Your Honor's ruling. Note my exception. And simply my last offer to persuade Your Honor, I'd say that to the extent that failure to wear the seat belt is causally related to the injury -- and all the statistics show it; everybody in America knows. That's why it is the public policy of Virginia that people should wear their seat belts and why it's against the law not to.

And I am not offering it for evidence of negligence or mitigation. Mitigation of damages is something that you would normally do after you get hurt. For example, if you had --

THE COURT: Well, I think, see, the problem is I think that the whole promise there is that you're -- the injuries are worse if you're ejected. That's the whole premise.

MR. PAGE: No question about that. It is really a bizarre system, but we have to admit --

THE COURT: It is a bizarre system, but, you know, when you're saying that her injuries are going to be worse if she's ejected, that's running against not wearing a seat belt.

MR. PAGE: I'm past the ejection. What I'm doing is I'm asking whether I can ask the witness whether if she would have been belted, she would have most likely received more injury.

MR. McGETRICK: The only quick comment from my one percent input here is that I think Rosy hit it on the head. He said, everybody in America knows about this. And it's my position that this is a question that you don't need expert testimony on. That statute or the rule says, "if specialized knowledge is needed." It's people's common sense.

THE COURT: I don't think so.

MR. PAGE: I sincerely hope we don't hear any objections when we're arguing our instructions or having our closing argument that because we didn't offer an opinion, this kind of injury was likely to occur because she was unbelted, that we can't talk about it.

THE COURT: No. I think you can talk about it. That's why I say, it's such a difficult line to draw. The statute makes it difficult to draw. It's not a very straight line, because I think the statute says, you can't introduce evidence of lack of wearing a seat belt in mitigating, so you can come right up to the point where you are introducing that evidence. You can lay the groundwork for an argument, but you can't actually introduce the evidence. It's a difficult point, Counsel. That's the best I can do with it.

MR. PAGE: Thank you very much, Judge.

(Sidebar conference concluded)

BY MR. PAGE:

Q. Dr. Piziali, with respect to the rib fractures that Mrs. Brown received in her pneumothroax or collapsed lung, what kind of blow would be required to produce that sort of injury?

A. Well, it would be from the left posterior area, and it would have to be a fairly significant blow. The smaller ribs up at the top are a little more difficult to fracture than the longer ones down the lower part of your rib cage; so in other words, it would take a fairly substantial impact to her shoulder. There haven't been enough studies to know exactly what the speed is, but just from experience in accidents, the rib cage is very strong, so it would take a very good velocity of impact to cause that.

Q. With respect to the hip injury, which I believe you indicated was to the trochanter area of the hip, can a person of Mrs. Brown's age -- what kind of force does it take to shatter the hip in terms of magnitude?

A. Well, it's up in the thousands of pounds. The federal Motor Vehicle Safety Standard criteria for loading in the femur, axial loading in the femur, is at 2,250 pounds that's allowed. In other words, that's considered to be the okay. The femur could typically handle that. So it has to be somewhat above that in order for the fracture to occur, so you're now getting up close to the 2,500 - 3,000-pound range.

Q. When you say that there was 3,000 pounds of loading, you actually mean that it took 3,000 pounds of compression or in that range to cause the tochanter to break?

A. Something over 2,250, and it could get up into that level, right.

Q. Finally, with respect to the pressure of the spine, what kind of force does that require to cause this sort of burst fracture?

A. Again, down the lumbar spine region, we're usually talking something over 2,000 pounds. It depends a little bit on how much flexion there is. The more flexion there is, the lower that force gets to initiate fracture; but given the burst nature of it, it looks like a fairly uniform initial fracture, so I would say it's up in that range.

Q. If you have a person that weighs less than 150 pounds, and you basically are able to load the femur with more than 2,250 pounds, the energy -- how do you create that kind of energy?

A. Well, it's actually force that you are creating. Basically some energy's associated with it. But if -- well, I just actually saw some statistics the other day. They did some studies on people jumping off things five-, six-feet high, a simulated parachute jump. When they land like that, they create up to five or six G's. That means there's five or six times their body weight acting on their feet.

Q. That's from how high?

A. I remember that the impact speed was around 13 miles an hour. I forgot the exact height right now. But they jumped so that they landed at 13 miles an hour. And different people landed differently as to how you bend your legs. Some people with four G's; some with six G's.

But anyway, six G's means that your feet are seeing six times your body weight, which means that a lot of your body is seeing some multiple of your body weight maybe six times. And so if you weighed 150 pounds, six times body weight would be 1,800 pounds. It wouldn't be enough to break legs, but if you double that, now you're getting up into the area where you could.

Q. So this is the kind of injury that you might see from somebody perhaps jumping off a roof?

MR. McGETRICK: Objection, Your Honor. He's leading the witness.

BY MR. PAGE:

Q. I'll perhaps rephrase the question. The injuries that we see here are -- how would you describe how you might pick up the axial load that's enough to give you more than 2,250 pounds at the trachanter?

A. Well, a fall from a height, if you have enough height, and depending on how you hit the ground, you can produce the right forces and the right G levels to produce the injuries. So as the doctor said, it's typical of somebody falling from a height.

Q. All right. Now Dr. Piziali, one last question. We have what I believe you and Dr. Churchill have described as an axial load that caused the trochanter to fracture, and we have an axial load that caused the spinal column to compress, as Dr. Churchill described it. Do you have an opinion, Doctor, as to the order in which those incidents occurred.

A. Not precisely. If only one leg was being loaded, then you know, the fracture levels are fairly similar to the spine, and the femur wouldn't be too far off. If both knees were being loaded, let's say the left one not enough to fracture the femur, but the right one enough to fracture it, then that load-sharing of the lower extremities probably mean that the force in the back caused that injury to happen first and then the lower extremity; but the magnitude of forces that caused injuries are not significantly different, so you couldn't tell much in the real details of the impact.

MR. PAGE: Thank you very much, Dr. Piziali. That's all the questions I have now.

THE COURT: Why don't we go ahead and take our morning recess, ladies and gentlemen, at this point.

(Jury exited the courtroom at 11:15 a.m., after which there was a recess from 11:15 to 11:33 p.m.)

THE COURT: All right, Mr. King.

(Jury entered the courtroom at 11:33 p.m.)

THE COURT: All right. Mr. McGetrick , you may proceed.

MR. McGETRICK: Thank you, Your Honor. Good morning, Your Honor.

Good morning, ladies and gentlemen of the jury.

Good morning, Dr. Piziali. It is still morning, isn't it?

CROSS EXAMINATION

BY MR. McGETRICK:

Q. Mr. Piziali, I would like to examine the seat belt buckle in this accident. You have examined that?

* * *

* * *

Would it be permissible to turn this podium around to where it more correctly faces the jury?

THE COURT: Yeah, as long as you don't take it away from the general area there.

MR. HEISKELL: I'm just thinking about moving it like this (indicating).

THE COURT: Right.

(There was a pause in the proceedings.)

THE COURT: All right, Mr. King.

(The jury returned to the courtroom.)

THE COURT: All right. Good morning, ladies and gentlemen.

Now that you have all of the evidence, it is the Judge's duty to give you the instructions of the Court concerning the law applicable to this case.

It is your duty as jurors to follow the law as the Judge states it to you and to apply that law to the facts as you find them from the evidence in the case. You must not base your verdict in any way upon sympathy, bias, guesswork or speculation. Your verdict must be based solely upon the evidence and instructions of the Court.

Counsel may quite properly refer to some of the governing rules of law in their arguments. If, however, any difference appears to you between the law as stated by counsel and that stated by the Judge in these instructions you, of course, are to be governed by the instructions. If any reference by the Judge or by counsel to matters of evidence does not coincide with your own recollection, it is your recollection which should control during your deliberations.

You are not to single out one instruction alone as stating the law but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by the Judge. Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the Judge, just as it would also be a violation of your sworn duty as judges of the facts to base a verdict upon anything other than the evidence in the case.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth and holding the same or similar stations of life. A corporation is entitled to the same fair trial at your hands as a private individual. All persons and corporations stand equal before the law and are to be dealt with as equals in a court of justice.

Justice, through trial by jury, must always depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all the jurors and to arrive at a verdict by applying the same rule of law as given in the instructions of the Judge.

You as jurors are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness or by the manner in which the witness testifies or by the character of the testimony given or by evidence to the contrary of the testimony, given, you should carefully scrutinize all the testimony given, the circumstances under which each witness has testified and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's intelligence, motive, state of mind and demeanor and manner while on the stand. Consider the witness's ability to observe the matter as to which he or she has testified and whether he or she impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear

to each side of the case, the manner in which each witness might be affected by the verdict and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony or different witnesses may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently. An innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy always consider whether it pertains to a matter of importance or an unimportant detail and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves. You may, in short, accept or reject the testimony of any witness in whole or in part. Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or nonexistence of any fact. You may find that the testimony of a single witness or a small number of witnesses as to any fact is more convincing than the testimony of a larger number of witnesses to the contrary.

The plaintiff has called adverse witnesses. The plaintiff is bound by as much of the testimony given by an adverse witness as is clear, logical, reasonable and uncontradicted. The plaintiff is not bound by any of the adverse witnesses' testimony that conflicts with any of the other evidence in the case.

The rules of evidence may limit the ability of witnesses to testify as to opinions or conclusions. Greater latitude is given to those whom we call expert witnesses. Witness who, by education or experience, have become experts in some art, science, profession or calling, may state an opinion as to relevant and material matter as to which

they possess expertise and may also state their reasons for the opinion.

Opinion testimony by qualified expert witnesses is competent evidence. You should consider each expert opinion received in evidence in this case and give each such opinion the weight you find it deserves. If you should decide that the opinion of an expert witness or his or her qualifications are not supported by sufficient education or experience, or if you should conclude that the reasons given in support of the opinion are not sound or that the opinion is outweighed by other evidence, you may disregard the opinion entirely.

During the course of a trial the Judge occasionally asks questions of witnesses in order to bring out facts not then adequately explained by their testimony and to expedite the presentation of evidence. Do not presume that the Judge holds any opinion on the matters to which the Judge's questions may have related. Remember at all times that you as jurors are at liberty to disregard all questions by the Judge regarding the facts in determining the weight of the evidence, but you are governed by the Judge's instructions as to the law applicable to this case.

Nothing the Judge says, nor any ruling of the Judge, nor any remark which the Judge has made, is to be taken as an indication that the Judge has any opinion of the facts of the case or what the opinion may be. It is the Judge's function to determine the law. The determination of the facts and the weight of the evidence is your function.

During the trial of this case certain testimony has been presented to you by way of depositions consisting of sworn, recorded answers to questions asked of the witness in advance of trial by one or more of the attorneys for the parties to the case. The testimony of a witness who, for some reason, cannot be present to testify from the witness stand may be presented on a video recording played on a television set or read into evidence. Such testimony is entitled to the same consideration and is to be judged as to

credibility and weighed and otherwise considered by the juror insofar as possible in the same way as if the witness had been present and had testified from the witness stand.

You are not permitted to treat parties differently. Everyone is equal before the law. All parties are equal before the law regardless of gender, creed, race or national origin. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court and reach a just verdict regardless of the consequences.

As stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence the Court has admitted in the case. Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case and, in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice. It is the duty of the lawyer on each side of the case to object when the other side offers testimony or other evidence which the lawyer believes is not properly admissible. You should not draw any conclusions or be prejudiced against a lawyer or the party he or she represents because of the making of an objection.

You are to consider only the evidence in the case, but in your consideration of the evidence you are not limited to the bald statements of the witnesses. In other words, you're not limited solely to what you see and hear as the witnesses testify. You're permitted to draw from the facts which you find have been proven such reasonable inferences as you feel are justified in the light of experience.

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of the case. One is direct evidence, such as the testimony of an eye witness or the admission of a document. The other is indirect or circumstantial evidence, the proof of a chain of circumstances pointing to the existence or nonexistence of

certain facts. As a general rule, the law makes no distinction between direct and circumstantial evidence but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

Now, the Court has said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate. The evidence in the case consists of the sworn testimony of the witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them, and all facts which may have been admitted. Any evidence as to which an objection was sustained by the Court and any evidence which the Court may have stricken must be entirely disregarded. Anything you may have seen or heard outside the courtroom about this case is not evidence and must be entirely disregarded.

A manufacturer has a duty to use ordinary care in accordance with the standards and practices existing at the time of manufacture to design a product for manufacture and sale that will be reasonably safe for its intended purpose. If a manufacturer fails to perform this duty then it is negligent.

The plaintiff has based her two claims for compensatory damages upon two basis. First, she alleges that Ford Motor Company negligently designed the 1991 Ranger 4x2, and, second, she claims that Ford Motor Company breached its promise or guarantee that when manufactured for sale the 1991 Ford Ranger 4x2 was reasonably safe when used for its intended purpose.

Each of these two claims must be considered independent, and finding in favor of the plaintiff or defendant as to any one claim does not, of itself, compel a similar finding as to the other claim. Also, if you find for the plaintiff, she is entitled a fair and reasonable compensation for her injuries and damages, but she is not entitled to more than one recovery for any item or element

of injury or damage claimed. Accordingly, the amount of her compensation would not be increased if you find in her favor on both claims or decreased if you find in her favor on one of the two claims.

Your verdict must be based on the facts as you find them and on the law contained in all these instructions.

The issues in this case as to the plaintiff's negligence claim are:

Number one, was the defendant negligent in designing the 1991 Ford Ranger 4x2; number two, if it was negligence, was its negligence a proximate cause of the injuries and damages claimed by the plaintiff -- on these issues the plaintiff has the burden of proof -- number three, was the plaintiff negligent; number four, if she was negligent was her negligence a proximate cause of the injuries and damages which she claims -- on these issues the defendant has the burden of proof -- number five, if the plaintiff is entitled to recover, what is the proper compensation for the injuries and damages which she has claimed -- on this issue the plaintiff has the burden of proof. Your decision on these issues must be governed by all of these instructions.

When a party has the burden of proof on an issue then the party must prove that issue by the greater weight of all the evidence. This is something called the preponderance of the evidence. A preponderance of the evidence in the case means such evidence as when considered and compared with the opposed to it has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true.

To illustrate, if you were weighing the evidence on a scale and the scale tilted in favor of the person with the burden, then that person has proven his or her element or claim by a preponderance of the evidence. In determining whether any fact in issue has been proven by a preponderance of the evidence the jury may, unless

otherwise instructed, consider the testimony of all the witnesses, regardless of who called them, and all exhibits received in evidence, regardless of who produced them. It does not make any difference as to whether the exhibits are marked for the defendant or for the plaintiff. The test is not which side brings the greater number of witnesses or presents the greater quantity of evidence but which witness and which evidence appeals to your minds as being most accurate and otherwise trustworthy.

The mere fact that a rollover happened standing alone does not permit the jury to draw the inference that the plaintiff's injuries and damages were caused by negligence or caused by a breach of warranty.

You shall find your verdict for the plaintiff upon her negligence claim if she has proved by a preponderance of the evidence that, number one, the defendant was negligent in designing the 1991 Ford Ranger 4x2, and, number two, the defendant's negligence was a proximate cause of the injuries and damages which the plaintiff has claimed.

You shall find your verdict for the defendant upon the plaintiff's negligence claim if the plaintiff has failed to prove one or both of the two elements herein or you find by a preponderance of the evidence that the plaintiff was contributorily negligent and that her contributory negligence was a proximate cause of her injuries and damages.

In determining whether the defendant negligently designed the 1991 Ford Ranger 4x2 you may consider the nature and extent of the inspections and tests performed on this motor vehicle or performed on other motor vehicles with the same or substantially similar design characteristics as well as any other evidence bearing upon the design.

There may be dangers associated with the use of any motor vehicle. The manufacturer of a motor vehicle such as Ford Motor Company is not an insurer of the safety of that vehicle. The manufacturer is not required to design or warrant an accident-proof vehicle or to incorporate into its

design the best and most highly advanced safety provisions. In other words, a manufacturer is not required to equip its vehicle with every available safety provision.

Negligence is the doing of some act which a reasonably prudent person would not do or the failure to do something which a reasonably prudent person would do when prompted by considerations which ordinarily regulate the conduct of human affairs. It is, in other words, the failure to use reasonable care or ordinary care under the circumstances in the management of one's person or property.

You are further instructed that reasonable care or ordinary care is a relative term and varies with the nature and character of the situation to which it is applied. The amount or degree of diligence and caution which is necessary to constitute reasonable or ordinary care depends upon the circumstances and the particular surroundings of each specific case. The test is that degree of care which an ordinarily prudent person would excercise under the same or similar circumstances to avoid injury to another or to himself or herself.

Contributory negligence is the failure to act as a reasonable person would have acted for her own safety under the circumstances of this case.

In determining certain of the issues in this case one of the elements of evidence which you may consider is the question of whether or not the plaintiff was wearing a seat belt when her motor vehicle rolled over. With regard to the plaintiff's negligence claim, you may consider the use or nonuse of the seat belt in determining whether the defendant negligently designed the motor vehicle, but you may not find the plaintiff guilty of contributory negligence based upon a finding that she was not wearing her seat belt when her motor vehicle rolled over.

With regard to the plaintiff's breach of warranty claim, you may consider the use or nonuse of the seat belt in determining whether the motor vehicle as manufactured

and sold was reasonably safe when used for its intended purpose and also in determining whether the plaintiff misused the motor vehicle.

The driver of a motor vehicle has a duty to use ordinary care, number one, to keep a proper lookout, number two, to keep her vehicle under proper control, and, number three, to operate her vehicle at a reasonable speed under the existing conditions. If a plaintiff fails to perform any one or more of these duties then she is negligent.

A proximate cause of a rollover injury or damage is a cause which in natural and continuous sequence produces the rollover, injury or damage. It is a cause without which the rollover, injury or damage would not have occurred.

When the defendant claims contributory negligence as a defense it has the burden of proving by a preponderance of the evidence that the plaintiff was negligent and that her negligence was a proximate cause of the plaintiff's injuries. Contributory negligence may be shown by the defendant's evidence or by the plaintiff's evidence.

If you find from a preponderance of the evidence that both the plaintiff and the defendant were negligent and that their negligence proximately contributed to the plaintiff's injuries and damages you may not compare the negligence of the parties. Any negligence of the plaintiff which was a proximate cause of her injuries and damages will bar the plaintiff from recovering upon her negligent design claim.

In accordance with the standards and practices existing at the time of manufacturer, a manufacturer of a motor vehicle promises or guarantees that its motor vehicle will be reasonably safe when used for its intended purpose. However, a manufacturer does not promise or guarantee the safety of a person who misuses the motor vehicle. This promise or guarantee, as the terms are used in these instructions, is sometimes referred to as a warranty.

Your verdict upon the plaintiff's breach of warranty claim must be based on the facts as you find them and on the law contained in all of these instructions. The issues in this case as to the plaintiff's breach of warranty claim are:

Number one, did Ford Motor Company breach its warranty to the plaintiff to manufacture or sell a motor vehicle which was reasonably safe when used for its intended purpose; number two, if Ford Motor Company breached this warranty did such breach proximately cause the injuries and damages claimed by the plaintiff -- on these issues the plaintiff has the burden of proof -- number three, did the plaintiff misuse the vehicle; number four, if the plaintiff misused the motor vehicle, was her misuse a proximate cause of her injuries and damages -- on these issues the defendant has the burden of proof -- five, if the plaintiff is entitled to recover, what is the proper compensation for the injuries and damages which she has claimed -- on this issue the plaintiff has the burden of proof.

Your decision on these issues must be governed by the instructions that follow.

You shall find your verdict for the plaintiff as to her breach of warranty claim if she has proved by a preponderance of the evidence that, number one, the 1991 Ford Ranger 4x2 as manufactured and sold breached the defendant's promise or guarantee to the plaintiff that the motor vehicle was reasonably safe when used for its intended purpose, and, number two, this breach of the defendant's promise or guarantee proximately caused the injuries and damages claimed by the plaintiff.

You shall find your verdict for the defendant if the plaintiff has failed to prove paragraph 1 or 2 of this instruction or if the defendant has proven that the plaintiff misused the motor vehicle and her misuse proximately contributed to the cause of the injuries and damages claimed by the plaintiff.

A superseding cause is an independent event not reasonably foreseeable that completely breaks the connection between a breach of warranty and the plaintiff's claimed injuries and damages. A superseding cause breaks the chain of events so that the breach of warranty is not a proximate cause of the plaintiff's injuries or damages in the slightest degree.

If you find your verdict for the plaintiff, then in determining the damages to which she is entitled you shall consider any of the following which you believe by the greater weight of the evidence was caused by the defendant's negligence or breach of warranty:

Number one, any bodily injury she sustained and their effect on her health according to their degree and probable duration; number two, any physical pain and mental anguish she suffered in the past and any that she may be reasonably expected to suffer in the future; number three, any disfigurement or deformity and any associated humiliation or embarrassment; number four, any inconvenience caused in the past and any that probably will be caused in the future; number five, any medical expenses incurred in the past; number six, the loss of earning capacity, if any, which she has sustained.

Your verdict should be for such sum as, in your fair and impartial judgment, will fully and fairly compensate the plaintiff for the damages which she sustained or will incur.

The burden is on the plaintiff to prove by a preponderance of the evidence each item of damages she claims and to prove that each item was caused by the defendant's negligence or breach of warranty. The plaintiff is not required to prove the exact amount of her damages, but she must show sufficient facts and circumstances to permit you to make a reasonable estimate of each item. If the plaintiff fails to do so, then she cannot recover for such item.

If you believe from the evidence that any injury or damage of which the plaintiff complains might have been due to either of two causes for one of which the defendant might have been responsible and for the other of which it is not responsible, and if you are unable to determine which of the two causes proximately caused such injury or damage, then you may not award compensation for such injury or damages.

The fact that the Court has instructed you on the proper measure of damages should not be considered as intimating any view of the Court as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given for your guidance in the event you should find in favor of the plaintiff from a preponderance of the evidence in the case in accordance with the other instructions.

All right. Is counsel for the plaintiff ready to proceed?

MR. HEISKELL: We are, Your Honor.

May it please the Court, good morning, ladies and gentleman of the jury.

This is the time when it is my duty and privilege to bring to focus the plaintiff's case and to close our case with argument in which I attempt to bring the facts that we consider very important together and get this matter before the jury in the most concise and persuasive

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the Ford Ranger 4x2 was not reasonably safe; not the Bronco II, not the Ranger 4x4, but the product in this case. He has the burden to prove that it was not reasonably safe. If the plaintiff fails in that burden, then your verdict must be for Ford.

The overwhelming evidence is the Ford Ranger 4x2 pickup is reasonably safe, not an unreasonably dangerous vehicle. What's the evidence about this particular vehicle in this case? It had 140,000 stable miles on it at the time of the accident. The Browns had driven it for three years with no problems in stability or handling. It was equipped with safety devices designed to keep you in the seat if you did roll the vehicle - - your seat belt. And remember that Chris Brown wore his. Mrs. Brown remembers that Chris Brown wore his. At the end of the accident he was in his seat, and he had an arm injury.

The cab in this vehicle was constructed tough enough to keep from crushing the driver or the passenger even in this violent kind of accident. We're talking about the top. Chris Brown stayed in his seat. He had no head injury, no spine injury, no broken ribs. And the photos that you've seen - - and they'll be in the jury room with you - - show that the driver's position was protected for a driver belted in the seat. If Mrs. Brown had been belted in her seat she would not have been injured or ejected - - or ejected and injured.

This particular vehicle has a safe history. It has safety equipment that are designed to deal with what happens if you do take it into a curve too fast and turn it over. And it had a safe cab. It withstood the violence of this accident so that a person belted in their seat would not be injured, and Chris is the best evidence of that.

This vehicle, although the plaintiffs tell you there has been no testing that suits them, has been very well tested. It has been tested in the way that vehicles are tested in the

automobile industry to determine whether they have a reasonable resistance to roll, how they react in real world circumstances.

I was, frankly, astonished - - and I will say this: The lawyers for Mrs. Brown are very good lawyers. It's their job - - it is their job - - to make out the best case they can make out, and if they have to make out a Bronco II case, you know, to try to get you to believe that this vehicle was defective, that's their job. And I don't hold it against them. I'm always kind of glad - - I'm always kind of glad when the guy turns around to me and says, you can't believe the limits those four lawyers go to, because when they've got to blame me they don't have much of a case.

But these are good lawyers, and you can count on

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testified for seven years that 0.69 would turn it over when his own data was showing it wasn't turning over at 0.8, 0.9 g's; not logical, no process. And basically, his process just to flap his arms and yell "jacking" loud and long enough for you to believe and then shows you a cartoon. And he has a Ph.D. in math. He could do better work than that if he wanted to.

Now, the plaintiffs in this case have chosen not to talk about the accident. They don't want anything to do with that. They chose not to call the police officer as a witness in their own case. Here's a guy who was on the scene. They knew he was there at the scene. They knew he saw the tracks in the gravel out of the travel lane. They knew he saw where the vehicle passed within a couple of feet of the road sign. They knew he placed her speed 15 miles an hour faster than she said she was going; i.e., 40 miles an hour. And at this stage of the proceedings you can't believe 40 miles an hour, because her own expert had her faster going than that when she was laying down yaw marks starting back across the road. In fact, he believes that she was going 53 to 55 miles an hour, and if she was breaking, he said -- which she knew nothing about -- she would have been going faster than that coming into the curve. And she testified -- and you will remember -- that she was breaking both before and after she got into the gravel. But they want to know -- that's one area where you've got to believe there's an expert who thinks she was going more than 55 miles an hour.

They knew this officer was a qualified accident reconstructionist. They knew he had found the gouge marks in the road that were four feet long and a half inch deep right where the vehicle lifted off. They knew he would say he hadn't heard of the Ranger 4x2 jacking because they haven't either, except for Dr. Richardson. They knew he had investigated the fact that Mrs. Brown was not belted. How

did he do that? Remember his testimony. He asked Mrs. Brown at the scene if she were belted. She told him she could not remember. He then went to the vehicle. He went and looked at the buckle. The buckle was not damaged. He put -- before he hooked the buckle up he looked at the belt. The belt did not appear to have load marks. He reached back, and he found that the tongue on the latch plate was still stowed on the webbing, and he took his hand and he pulled it down. And there was nobody in the seat, so he pulled it down this way (indicating), and he put it where it would have gone into the buckle, and he said -- and he testified there was not enough room for a person to sit there. Now, that's kind of a good investigation.

And the idea that you fly in the face of that one by saying, well, gee, Mrs. Brown didn't come out until towards the end -- where did the glass in the window break? That had to go before she came out. We don't know that. That's a piece of evidence we don't have. Where was she as the vehicle went around? Was she hung up in the top of the vehicle, and did something about the way the vehicle hit the ground push her back down so she could be released out the window? We don't know the answer to that, but one thing I am sure of, and that is where she came to rest has nothing to do with whether or not that belt was buckled.

They knew he had determined that Mrs. Brown had been ejected and thrown at least twenty feet, and they didn't call him, even to tell you where the marks he found were or to tell you about the accident. You're entitled to consider that. There's some talk that he had been interviewed by Mr. Cromwell. That's true, but he could have been interviewed by anybody. He was talked to by anybody. His deposition was taken. There was no secret about what he was going to say. And you didn't see any heavy cross-examination or impeachment with his deposition. This wasn't a secret coming in.

Who else didn't they call? They didn't call Chris Brown, the plaintiff's son. And of anybody in the world that

could say that Mrs. Brown was belted, I guess he could say it. Anybody who could say his mother wasn't speeding, he could say it. Now, what he wouldn't say we don't know. Maybe he would say as Mrs. Brown said, "I don't remember."

I think from the evidence in this case that you will believe at least the following things happened. And let's talk a little bit about the accident scene.

I'm going to place on the Elmo here, if we can go back to that, please, ma'am -- and you'll have these exhibits. This is Exhibit 266 A, and it's a little tough, I know, for you to see, but what you're going to see is that you have a black mark coming right out from under this police car right across -- right in front of that line there. And it comes down, and you'll be able to follow it along in the photograph. That's looking back in the direction Mrs. Brown was coming.

And if you'll look at this photograph, that's looking in the other direction, and you can see the police car sitting there, and you can see that black mark starting right there coming back in. It's kind of hard for me to believe it started right there and it wasn't back off the road some. The police officer thought it was, but you'll have to look at that evidence and make your own decisions.

Then you'll look here -- and, incidentally, this is the point -- this is the point where Dr. Richardson in his accident reconstruction says that Mrs. Brown was going 49.8 or 50 miles an hour. And you'll remember he said he couldn't calculate it back any further than that, but he would agree that back through the intersection if she took her foot off the gas and was braking that she would have been going faster, and he got up to 53 and 55 and then said he wasn't aware of the braking.

Then this is another photograph looking back up toward the police cars. You can barely see the police car up here, and what you see right there where those lines cross -- that's where the rear wheels of the truck came around and crossed the front wheels and began to get sideways. And it comes on down here, and you can see this mark right back here, and you can see that gouge mark there. And you'll be able to see it better, but it's right there, four feet long, a half inch deep where the rim dug in.

And, you know, they're going to say, Mr. Richardson said that wheel was two or three feet off the ground, but remember the Bronco II tip-up that they showed? The wheel got higher than that off the ground and came back down. So, you know, you're going to see that.

And this is looking on towards the accident scene. You can see where these two marks go down, that being the left front, and this being the left rear. And again, that gouge mark is right there.

And I think when you look at that and you realize that everybody agrees that she was going, you know, 50 miles an hour when that black mark starts that she had to be going at a pretty good clip and probably over the speed limit when she came into that intersection, taking into account her breaking.

Now, I think you're going to believe that Mrs. Brown was driving too fast for the conditions and probably faster than the speed limit, and the Court instructs you if she was doing that that that is negligence. That's in his instruction.

With respect to speed, what else do we have? We have the medical records. And remember when Dr. Churchill was testifying he said that this was an unrestrained person in a vehicle that was going 65 miles an hour. That was reported in the medical records. And Mrs. Brown did tell you that she was braking before and after she was on the gravel, so I think you're going to believe she was going too fast for the speed limit, and I think you're going to

believe that Mrs. Brown didn't keep a proper lookout, or at least she didn't see what a proper lookout would disclose.

Because, you know -- I apologize for not being a techie on this one, but this Exhibit 142 A has been in evidence.

When you're coming into that intersection that's what you see. And that pole is sitting right there, and the road sign is right there -- and you'll have a chance to look at that -- and when you're coming in there it's pretty clear the road goes off. You'll see from the evidence that this is a long, straight stretch of road, and that pole would have been clearly visible. You'll remember in those pictures we saw the street sitting off here on the side.

But that's what you see if you come directly into this intersection. And if you straighten it out a little bit and get up too high, like the police officer said, you realize that if somebody had been watching where they were going, they would have seen it. I don't know what was going in this car, but it's clear to me that Mrs. Brown came into that intersection faster than perhaps she should have with a wet pavement, and she didn't keep a proper lookout. She failed to keep her vehicle under proper control.

You know, even Dr. Richardson admits -- and in a few minutes I'll show you that testimony -- that her getting into the gravel was not Ford's fault. And I think you're all going to believe that once she got into the gravel and got to sliding and yawing and heading towards that pole that she was forced to put in one massive steering input, because otherwise she was heading in this -- you know, she was headed right into there. And, so, she put in one massive steering input, and now she's heading back across the road. She cranks in another input, and the rear end of the truck comes this way. Now it swings around and gets sideways and is going down the road between 40 and 50 miles an hour. And these things are not made to run sideways. They are not made to run sideways, and that rear rim picked up four feet of asphalt, and it rolled. And I think you're going

believe that virtually any other vehicle under similar circumstances would have rolled.

Yes, it was steering inputs. She had to put the steering inputs in because she had gotten herself in a position of going fast in the middle of that intersection on the gravel.

Now, I wasn't there. Please understand that. And neither was anybody else here in the courtroom except Mrs. Brown, and she does not remember. But I wasn't there. The officer was there, and he testified to you that he was able to start at the point where she ran off the road and to walk back up these marks, and when he got up to the intersection he was able to show -- he was able to show and see where she had come across outside the travel lane; that she had taken the curve a little high.

And I think you're going to believe that Mrs. Brown was driving too fast for the conditions, failed to keep a proper lookout, failed to keep her vehicle under proper control, and the Judge has instructed you that those things are negligence, and if you believe that that contributed in any little way to her accident then she cannot recover on her negligence count.

And remember when we're talking steering inputs why she had to make them; because she had gotten up on that curve too fast, and then she was forced to yank it left and yank it right, and that's what made those marks and brought that rear end around, and that's what caused the vehicle to slide sideways.

You know, Mr. Thomas did one other test that I failed to mention. That is, he went to the middle of this parade ground and he got the 4x2 Ranger going 50 miles an hour and he just slammed on the brakes. Do you remember that? And it skidded to a stop. And he had the measuring device to see how many longitudinal g's that would pull, and what he found was that that was 0.72.

When you slam on the brakes -- remember, when you slam on the brakes in your car the wheels kind of go down, and you're pulling g's in this direction, not lateral g's across the car. That was 0.72. In the video that we showed you of the vehicle going in the circle it was pulling 0.82.

And I will ask you to remember that this accident did not occur on a parade ground, it occurred on a piece of road that at the point, where she started to cross, was nineteen feet wide. If she was going to stay on that road in the situation she had gotten herself into she had to crank steering into that thing, and when she did the result was that it turned sideways and started down the highway, and it tripped and it rolled. And this was not a little 0.8 G experience. This was not a little lane-change experience. This was an experience that was violent enough to shoot that vehicle over three complete times, maybe four.

And it is uncontradicted in this case that there was enough force in that vehicle going down, after it tripped, after all that speed had been struck off by the sliding and skidding, to put it in the top 4 percent, more violent than 96 percent of all rollovers. Remember that when you're trying to decide whether the fact that this vehicle rolled over in this accident. Remember that there was enough force left after all the sliding and the skidding and the braking -- once she got sideways there was enough force to trip it -- and, you know, if it had just kind of rolled over, maybe, like that or that (indicating) that's one thing, but it didn't, it rolled over three, we know, and we think maybe four complete times. A lot of energy. The only way you get energy is with speed -- speed.

Now, ladies and gentlemen, I think, you know, you're going to believe that Mrs. Brown was negligent, and you're going to believe that her negligence caused the accident, that her getting in the gravel caused the accident, her vehicle to start sliding and skidding, that she did that because of a combination of speed under the circumstances, failure to keep a proper lookout and failure to keep her

vehicle under proper control and that that led directly to the ultimate injury in this case.

I think you're going to believe that, and if you do believe that under the Judge's instructions you're going to have to deny her recovery and return your verdict for Ford on the negligence claim.

Now, I don't think there's any evidence to the contrary. I don't think there's any evidence that she wasn't driving too fast for conditions. I don't think there's any evidence that she did keep a proper lookout. I don't think there's any evidence that she did keep her vehicle in the proper lane. The police officer was the only guy there that remembers, and he testified, so I don't think you can just assume, well, there was nothing inherently incredible about what the officer said about what he remembered.

And remember those yaw marks. You don't lay down black marks going around a curve unless the front wheels are skidding, the first set, and then you crank in and you're skidding the other way, and she comes around -- and you know, putting in the steering was just something that Mrs. Brown had to do, because she had gotten herself heading right into that curve, and if she -- you know, she was either going to put in the steering or go off into that sign. The officer said she ran within a couple of feet of it as it was.

Now, look at the Court's instructions. There's one that says, you know, that proximate cause involves something that without which the rollover injury and damage would not have occurred. Mr. Richardson admits that she didn't cause it, and there's no way in this world that she didn't contribute to that rollover.

And remember that the Judge gives you an instruction that says you can't compare the negligence. If there's a whole lot of negligence here and that much (indicating) of it was the defendant's, you'd have to find for Ford on the negligence instruction.

But the important thing to remember is that this was a reasonably safe vehicle. I don't really think you're going to have to get to the point where you consider whether Mrs. Brown was somehow responsible, because if you find the vehicle was reasonably safe that ends it. That ends it for warranty, and that ends it for negligence. Only if you find that Ford was negligent will the Court ask you to get to the point where you consider Mrs. Brown's negligence.

If you find that Ford is negligent and you find that Mrs. Brown was negligent and her negligence contributed to her injuries, then under the law, as the Court has read it to you, she must -- her case must fail.

Now with respect to the warranty claim, the vehicle, again, was reasonably safe, and I don't want to go back through all of that. All the things that I've said about the vehicle that have been proved and all the things that I have said about the vehicle that have not been proved by the plaintiffs about this 4x2 vehicle apply just as well to the warranty claim. And under that warranty claim if you find that it was a reasonably safe vehicle, that's an end to it.

And I've talked about the fact that there's been no evidence about the 4x2 really being defective at all. There's been some talk about Broncos, and maybe a little bit about the Ranger 4x4, but there's been no discussion about the Ranger 4x2 except for Dr. Richardson, who hasn't done anything about it, and I won't bore you with that again.

One of the things that makes this vehicle reasonably safe is that it's equipped with seat belts. There's not hardly anybody left standing these days who has grown up who doesn't know that you're supposed to wear your seat belt. You're supposed to do it. You know they are designed to hold you in your seat in the event that an accident or rollover occurs. You know that.

Mrs. Brown actually told you that she knew that, but the evidence in this case is that, for whatever reason, on that day when the officer investigated there was no evidence that she was buckled up, and, in fact, she doesn't recall being buckled up. And the only -- and we know that at the end of the event she was ejected.

And, again, these good lawyers have made a real shot at trying to get you to believe that something happened in there that caused her to become unbuckled. Well, that is really stretching it. It's a great argument, it took a good lawyer to make it, but you think about what the police officer said, and you make the decision.

Now, remember that the Court also has instructed you that even if you found that the vehicle was, under the warranty claim, not reasonably safe but that it had been misused -- misused -- the plaintiff can still not recover. And that's kind of where this seat belt business comes in, because, you know, if you're going to say something isn't safe then you ought to -- that Ford Motor Company ought to pay you money because it's not safe, it's kind of rough when you don't take advantage of the very pieces of equipment that were put in by the Ford Motor Company to help you out if you get into a tight situation like Mrs. Brown did and you have to put in a bunch of heavy steering and you roll it over.

And, again, remember that all vehicles will roll. There is no such thing as a propensity of a vehicle to roll. A driver does it. They put it too much speed, too much lateral g's, fast turn this way, fast turn this way -- the vehicle is now going sideways, and when it goes sideways, when it starts sliding sideways it's not meant to go that way, and what we saw -- and this is kind of critical -- in that turn that Mr. Thomas was running -- he got 0.82 g's. The vehicle didn't tip up, it didn't roll, it didn't do anything. And we know that that CG didn't jack. When he slammed on his brakes he only got 0.72. And we have so much energy in this accident that this vehicle when it's going down the road turns over, just like the police officer and NHTSA say vehicles do.

Now, ladies and gentlemen, I'm going to ask you to kind of graze back through your memory on this case, and I think -- I may repeat some things, but I hope I don't. First of all, this is a Ranger 4x2, not a Bronco II. January 1, 1982, the first prototype -- I'm sorry -- the first vehicle was sold. There were 380 prototypes. 45 crashed, and the other prototypes were driven 2.5 million miles. There was J-turn testing. In fact, Mr. Richardson -- I showed you where he believed it probably was to the limits before the 1991 model year ever hit the market. No Ranger 4x2 testing program was ever suspended, and no Ranger 4x2 was ever pulled off the track.

Ford has proven it did limits testing. It took its vehicle to the limits in testing. Mr. Brown took her Ford Ranger beyond the limits; too fast into a tight situation, yank it right, yank it right to try to stay on a nineteen-foot road. You couldn't run any of the tests that we saw Mr. Thomas running or we saw any of the other vehicles running on a nineteen-foot road, and she put that much pressure on it, and she exceeded its limits, and notwithstanding the fact that she wasn't wearing a safety device that Ford provided for her, she's now asking you to have Ford compensate her for the injuries.

They were injuries, and there's no question about that. I'll address them very briefly, because I don't think you're going to get to them at the end of this argument.

Rollover. The Court has instructed you that just because it rolled over doesn't mean it was defective. Any vehicle can be made to roll over by a driver; compact cars, mid-size car, full-size vans, tractor trailers, pickups. The officer told you that.

This accident was very violent, three to four rolls. Seat belts in the vehicle. The belted passenger -- minor injury. The ejected driver -- serious injuries.

And remember that Dr. Churchill and Dr. Piziali both testified -- Piziali is a Ph.D. doctor, and Churchill is an M.D. doctor, bone doctor -- that the injury to the hip was an axial load this way, like you would get if you jumped off a building. Now, if you're rolling along in a car and you're belted there's not that much way get that kind of load, but if you're ejected in the air and you come down anywhere in here (indicating) you can get that kind of axial loading that will cause these injuries.

So, I think there's pretty strong evidence that the injury was the result of the ejection. I'll leave that to you, but you heard the evidence, and I think you will find that to be the case.

Now, let's talk about this suspension. The evidence is that this is a twin I-beam suspension; that Ford put it in not to save money, not because it was lighter or worse. They weren't cutting corners. They put it in because when in fact it was more expensive and heavier because they thought it was better.

And there is no evidence in this case that the other choice, the MacPherson strut, has ever been in any pickup truck. It's a car suspension system. So, the idea that they should have used a MacPherson strut instead of a twin I-beam is kind of silly. And it's also peculiar if you say they should have used the short- and long-arm suspension that GM used. Ford believed it made better trucks than GM. You may not agree with that, but they thought their suspension was tougher, better and more customer-friendly. And, you know, that's not the stuff that negligence is made of, particularly when you have the testing that was done on these vehicles both before and after -- both before and after -- it went to market.

So, Ford is being accused by a guy who made no calculations, no tests, no videos, no measurements, no nothing, of being negligent for selecting a twin I-beam suspension that really served the F series well.

The vehicle was purchased by Mr. Brown. It had 97,000 miles on it. It drove perfect for three more years and another 40,000 miles; no mechanical problems, no nothing. It never failed to start; reliable, dependable. It was a good vehicle.

And I'm running short on my time, but there are just a few things that I think would probably help. We've already seen Dr. Richardson suggest that he thought there were J-turn tests to the limits, and he said, you know, there's -- he agreed.

"You would agree with me, wouldn't you sir, that nothing about the Ford Ranger, the design of the Ford Ranger, caused it to get into gravel initially? That's right, sir. And you would agree with me, would you not, that if Mrs. Brown never got into the gravel in the first place this rolling over would not have happened? Probably not."

Mr. Richardson agrees that braking would have slowed her down. There's no question about that.

Richardson says the Bronco II would roll at 0.65 lateral g's when his own data showed 0.9. There's no question about that.

Mr. Richardson agrees that one of the key documents that Mr. Heiskell is going to talk to you about, Plaintiff's Exhibit 1, which he talked to you about -- Mr. Richardson said, so, nothing about this document indicates any dissatisfaction or concern about the Ranger 4x2 stability index, does it, Dr. Richardson?

"Answer: It just doesn't address it. It doesn't give approval to the 4x2, nor does it criticize the 4x2." So, there's nothing in that document that Mr. Heiskell is waving around that Mr. Richardson thinks has anything to do with the 4x2.

Can we go to the computer, please, ma'am?

That's the section I was just looking at. Dr. Richardson is basically saying this document, this key document in this case that you were asked to put a lot of faith in, doesn't have anything to do with the 4x2.

And you'll remember during the course of the case he was handed several documents that he just gave back to counsel and said, this doesn't help me. But these good lawyers want you to believe it.

Ladies and gentlemen, Dr. Churchill made a very forthright appearance. The first page he's reading from, the notes of the helicopter people, Rescue's initial assessment: "Patient reported to have been thrown twenty feet. Unrestrained driver of small truck was involved in a rollover accident at approximately 65 miles an hour."

Dr. Churchill: Normal on the Glasgow Scale of trauma when she arrived at the hospital. What does that mean? She didn't have any head injury. She could think and talk. She was rated 15 out of 15, and the idea that she couldn't say what had happened is kind of funny under the circumstances, or at least say the truth about it.

And the doctor -- Dr. Richardson again -- I'm sorry, Dr. Churchill again on how her injuries could have been sustained: "Her injuries could have been sustained when she was thrown from her seat when she was unrestrained, correct? That is correct. Her injuries could have been sustained when she was ejected from the vehicle and landed because she unrestrained. Is that

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